90-682

Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

RICHARD KELLY - PETITIONER

vs.

UNITED STATES OF AMERICA - RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the government deny the defendant's right to effective assistance of counsel guaranteed by the Sixth Amendment when the government informer, by guile, intentionally intruded into and participated in the defendant's attorney-client and trial strategy conferences while the defense was preparing for trial in the defendant's Congressional office and while there the informer stole confidential defense documents from the defense attorney's briefcase and from the office and the informer transferred the stolen documents to his FBI superior as he was instructed and disclosed confidential defense information, obtained during the intrusion, to the prosecutors in the instant case, by a letter, including a reported statement against interest by the defendant and the intruder requested assistance in sentence reduction in an unrelated

bank robbery charge pending against the intruder in another federal court, and the prosecutors requested and obtained additional disclosures of confidential defense information from the intruder, contained in an FBI "302" report received by the prosecution prior to trial, wherein the intruder informed the prosecutors that the defense strategy was emphasizing a government agent the defendant believed the FBI had placed on his congressional staff, and the FBI agents interviewing the intruder for the prosecutor supplied the name of the agent the defendant referred to and specifically asked if that name had been heard during the intrusion by the intruder; and the prosecutor in the unrelated bank robbery charge against the intruder was also present at the FBI interview and the intruder received a greatly reduced sentence?

2. Did the government violate the defendant's right to privacy for his papers to be secure as guaranteed by the Fourth Amendment when the government informer stole defense documents during the intrusion into the defendant's congressional office and the defense trial preparations?

3. Did the United States Attorney's acceptance of the letter and the confidential defense information it contained and then circulation of it to the prosecutor in the office with immediate responsibility for the instant case, who then ordered an FBI interview of the intruder to obtain additional disclosures of confidential defense information as contained in the FBI "302" form in evidence and then for the government to reward the intruder by a reduced sentence in an independent and unrelated crime, cause the prosecutors to be a party to the intentional intrusion into the defendant's attor

ney-client and trial preparation conferences and deception of the court and the violation of the defendant's right to due process guaranteed by the Fifth and Sixth amendments?

4. Did the government violate the defendant's due process rights guaranteed by the Fifth Amendment when the prosecutors suppressed the fact of the intentional intrusion into the defense camp and the disclosures and the identity of the intruder and the documents in the prosecutor's file prior to trial, the "letter" and the FBI "302", and neither submitted the matter to the trial court or notified the defense?

5. Was the defendant's due process right to a fair trial guaranteed by the Fifth and Sixth Amendments denied by the duration of the suppression because the defendant's standing and credibility is prejudiced by the adverse verdict and court

decisions that did not have the suppressed impeachment evidence on the due process and the entrapment issues or awareness of the intrusion and the government interference with the adversarial process.

6. Is the defendant denied a fair trial and due process guaranteed by the Fifth and Sixth Amendments because in this case no jury or court has ever considered the evidence in its entirety and all of the issues with the adversarial process functioning free of government interference?

7. Did the government interfere with and violate the defendant's right to effective assistance of counsel guaranteed by the Sixth Amendment by suppressing the documents, the "letter" and the FBI "302", for more than four years, until the intrusion and suppression were exposed by a neutral source, which effectively prevented prompt adversarial investigation and testing and

participation in the adversarial process during the trial and appellate processes, and by the denial of the statements made by the government's "star performer" in the instant case to the intruder and the other suppressed evidence, all of which were valuable for impeachment and on the defense issues of entrapment and due process violations of government overreaching and overinvolvement in the creation of crime, and, due to the length of the suppression, prejudicing the defendant in the defense obligation of proof related to showing the materiality of the suppressed evidence and actual prejudice resulting from the intentional intrusion into the defendant's attorney-client relationship?

8. Does the law require that the prosecutor be aware of an intentional intrusion by a government agent into defendant's trial preparations prior to the fact or to

thereafter condone the conduct in order for the intrusion to be intentional?

9. Does the Chapman harmless error rule apply in the context of this case if the evidence establishes that the defendant's rights guaranteed by the Sixth Amendment were violated?

10. Was the defendant's right to due process guaranteed by the Fifth Amendment violated when the District Court ruled post-trial that [the defendant] was entrapped as a matter of law and acquitted the defendant, and on the government's appeal the government contended that no such ruling had been made, and the Appellate Court refused to remand for clarification of the grounds on which the acquittal was based and, on erroneous speculation, the Appellate Court reversed the acquittal, and when the District Court later clearly affirmed it had post-trial ruled the defendant was entrapped

as a matter of law the Appellate Court declined to correct their error and discharge the defendant?

11. Under the facts of the instant case, including the continued conviction of the trial judge that the defendant was entrapped as a matter of law, is evidence of relatively minor importance sufficient to undermine confidence in the outcome of the case?

12. Were the defendant's due process rights guaranteed by the Fifth Amendment violated when the trial Court on December 15, 1987, permitted the government to file affidavits in the instant proceeding fourteen (14) months after filing would have been timely, over the objection of the defendant and in violation of an open court stipulation that the government would submit the matters on the pleadings and affidavits before the court as of September 19, 1985,

and counsel for the government expressed appreciation on that date in open court for the trial judge's having afforded the parties a full opportunity to present their views and the government gave no explanation for having failed to timely file the affidavits and the defendant, being prejudiced by the late filing and the violation of the stipulation because he had waived his right to an evidentiary hearing and his motion for discovery and to strike the government's pleadings as not having been timely filed, all in reliance on the stipulation, and the defendant's counsel, who served seven years without compensation, had withdrawn by the time the Court permitted the stipulation violation and late filing and the defendant was then pro se?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT IV TO THE UNITED STATES CONSTITUTION

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describ

ing the place to be searched, and the persons or things to be seized.

AMENDMENT V TO THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War of in public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI TO THE UNITED STATES CONSTITUTION

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

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OPINIONS BELOW

The Judgment of the Court of Appeals is unpublished and appears in Appendix A to this Petition. The Memorandum And Order of the District Court for the District of Columbia is unpublished and appears in Appendix C to this Petition. The Judgment substantially adopts the Memorandum And Order of the District Court and is unpublished.

JURISDICTION

The Court of Appeals Judgment in this matter was filed on April 23, 1990. A timely Petition For Rehearing was filed and the Court of Appeals denial was issued on July 25, 1990, and is set forth in Appendix B. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

NO. _____

IN THE SUPREME COURT
OF THE
UNITED STATES OF AMERICA

OCTOBER TERM, 1990

RICHARD KELLY, Petitioner

vs.

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Richard Kelly, hereinafter referred to as the defendant or Kelly, respectfully prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the District of Columbia Circuit entered in this case on April 23, 1990, and on May 10, 1983.

STATEMENT OF THE CASE

An indictment returned on July 15, 1980, charged the defendant, Congressman Kelly, with conspiracy to commit bribery and to defraud the United States (18 U.S.C. Section 371), bribery (18 U.S.C. Section 201[c]), and interstate travel to engage in bribery (18 U.S.C. Section 1952), all in connection with one of the cases referred to as Abscam. Eugene Ciuzio and Stanley Weisz were charged as co-defendants and post-trial were granted a new trial and thereafter proceeded separately. The District Court found that these co-defendants, along with William Rosenberg, an unindicted co-conspirator, were government agents. (App. H; 539 F.Supp 363, 371).

Kelly filed pre-trial a motion seeking to dismiss the indictment on due process grounds. The District Court deferred ruling on the due process motion until after trial,

which commenced on December 4, 1980. At the start of the trial, the defendant immediately also asserted the defense of entrapment.

The evidence now before the Court shows that the trial and two successive appeals were conducted with the courts, the jury and the defendant being unaware that the government had suppressed documents, a "letter" and an FBI "302" report which in combination mentioned the defendant's name over fifty times and that were in the prosecutor's file prior to trial. These documents had been specifically requested by the defendant prior to and during the trial and suppressed until exposed by a neutral source and that the documents would have disclosed the following:

1. that a government informer had intentionally intruded by guile into and participated in the defendant's attorney-client and defense strategy conferences

while the defense was preparing for trial in the defendant's congressional office, by the intruder representing he had been an FBI informer and had been under the witness protection plan and knew how FBI scams and stings operated and was disenchanted and wanted to help the defense, and while there the intruder had stolen confidential defense documents from the office and defense counsel's briefcase and the intruder had disclosed, to the prosecutors, confidential defense information, including a reported statement against interest by the defendant personally, obtained by the intrusion;

2. that the prosecutors requested and obtained additional such disclosures from the intruder by an FBI interview, all prior to trial and none of this reported to the Court or to defense counsel;

3. that at the interview of the intruder requested by the prosecutors the FBI

interviewer, seeking information which was learned during the intrusion, inquired specifically if the intruder had heard mention in the defense camp of a DEA agent provocateur, by name, who was identified in discovery requests by the defense as a central figure to the defense and witness and was shown by the evidence at the trial to be on the defendant's congressional staff, with the knowledge of the DEA, for more than a year prior to the event for which the defendant was charged. This agent was actively engaged in attempting to cause the defendant to appear predisposed to wrongdoing and caused the defendant to be associated with the co-defendants either directly or indirectly and to be associated with felons on federal parole whose status as such was unknown to the defendant and who made attractive financial offers to the defendant all of which were declined. The

intruder did not recall the name but confirmed by repeating what the defendant said during the intrusion that the defense strategy was emphasizing the defendant's claim that such an agent as the defendant claimed was put on his staff by the FBI;

4. the identity and status of the intruder;

5. that the intrusion lasted all afternoon;

6. that the intruder was rewarded by receiving a greatly reduced sentence agreement on an unrelated bank robbery charge for his services related to the intrusion into the Kelly defense camp and that the United States prosecutor in the bank robbery case was present at the FBI interview requested by the prosecutor in the Kelly case;

7. that within the six (6) to nine (9) months prior to the intrusion the intruder

had engaged in conduct similar to the instant intrusion for the FBI including:

a) committing perjury in a federal court with the knowledge of DEA and FBI agents

b) suppressing along with a DEA agent that another witness was committing perjury in a federal case

c) rifling an attorney's client files and reporting the contents to the FBI and attempting to entrap the attorney

d) planning with the FBI an intrusion into a defense camp, in a federal courthouse, wearing a wire, which was vetoed by the prosecutor;

8. that the intruder had been present in the defense camp to obtain defense information for the government and not to be of assistance to the defendant as the intruder had represented to defense counsel;

9. that FBI agents had caused the intruder to be introduced to Mel Weinberg, an FBI informer and convicted felon and a principal FBI agent in Abscam and an important witness in the instant case, in order for Mel Weinberg to instruct the intruder on sting operations and how to do things to cover the agents and to entrap someone without the agents knowing what had been done;

10. that the intrusion into the defense camp of the defendant was planned between Mel Weinberg and the intruder;

11. that when the intruder went to Washington, D.C. for the intrusion he stayed at the hotel where Weinberg instructed;

12. that the purpose of the planned intrusion was to obtain defense information and documents for the government and to profit the informers;

13. that the stolen documents from the defendant's office were passed on to Mel Weinberg according to Weinberg's instruction by leaving them at the front desk of the hotel;

14. that Mel Weinberg told the intruder:

a) that he, Weinberg, had perjured himself numerous times in court,

b) that Congressman Kelly was selected to be corrupted because he was having financial trouble and seemed vulnerable,

c) that no matter how squeaky clean a person is, a good con-man who is a government informant can corrupt them,

d) that an additional advantage that he, Weinberg, had in Abscam was that he had control. He knew when calls were recorded and when they weren't. Using other people he could entrap

congressmen and the FBI could truly claim that they did nothing improper,

e) that for some two years he was maybe the most powerful federal agent in America. As a lawbreaker he selected lawmakers to corrupt and had a free hand. He was paid by tax dollars, more than most any cabinet official, and was without constitutional or legal restraint,

f) that the defendant Kelly was targeted and that the FBI did not know the process or criteria,

g) that you should never tell an agent anything you will later have to deny,

h) that he, Weinberg, did the selection of the people to corrupt and he then sought out people who could reach these people. It was simply a matter

of finding out how to pressure them to overcome their resistance.

This evidence and notice of the intrusion and disclosure of defense information to the prosecutors was suppressed for four and one half (4-1/2) years until disclosed by the intruder filing an affidavit in an unrelated case in another federal court. The defendant learned of this affidavit through the news media and then filed pleadings and additional discovery requests which notified the prosecutors that the suppression had been exposed.

The Court at the close of the evidence instructed the jury on the law of entrapment. The jury found the defendant guilty on all counts.

The defendant, post-trial, filed a Renewed Motion For A Judgment of Acquittal on the grounds of entrapment as a matter of law. Ground three of this motion stated:

> There was no evidence upon which a reasonable mind might fairly conclude beyond a reasonable doubt that the defendant was predisposed to commit the crimes alleged in the indictment; hence as a matter of law the defendant was entrapped.

The District Court entered its Order granting both this motion and the defendant's pre-trial motion to dismiss the indictment on due process grounds. (Appendix G)

The District Court Order granting these motions included the preliminary language: "For the reasons stated in the accompanying memorandum." (Id.) The accompanying memorandum, however, specified that it was limited to "reasons ... the court is dismissing the indictment against Kelly ..." (App. H; 539 F.Supp. 363, 365). The District Court at the time did not publish or offer any reasons for acquitting the defendant.

The government in its Brief on Appeal argued the District Court had acquitted the

defendant "without professing to disturb the jury finding with regard to entrapment" which may have contributed to the Appellate Court, by a majority, concluding that the District Court had "allowed the jury to determine whether the defendant Kelly was predisposed" (App. F; U.S. v. Kelly, 707 F.2nd 1460, 1474) and, by majority, holding "we do not interpret [the trial judge's] decision to hold that Kelly was entrapped as a matter of law." (Id. at 1468 n. 48). The argument of the government, adopted by the Court of Appeals, was fatal to the Judgment of Acquittal and the speculation of the Court of Appeals regarding the predisposition determination was in turn fatal to the due process ruling of the District Court. (Id. at 1476).

The District Court had stated in its Order there would be an accompanying memorandum giving reasons for the Order but when

the accompanying memorandum specifically stated it was limited to the dismissal of the indictment portion of the Order this could not be a ground for speculating that the memorandum applied to the judgment of acquittal or deciding that the acquittal had not been granted or that it had not been granted on the grounds upon which the motion for acquittal was based. The ultimate disposition of the Appellate Court did both.

The government appealed the Order, contending the District Court had not ruled the defendant had been entrapped as a matter of law. The Court of Appeals reversed both the judgment of acquittal and the dismissal of the indictment. The Court of Appeals, in making their judgment, denied a defense request for remand to permit the trial judge to specify the grounds or reasons for his granting the acquittal. The Appellate Court determined: "the sole issue properly before

us is the correctness of the due process ruling." (App. F; 707 F.2nd. 1460, 1974-5).

The prosecutor's suppression was still in effect. The defendant thereafter filed a petition for certiorari before this Court which was denied. U.S. v. Kelly, 464 US 908. Simultaneously the defendant requested a hearing before the District Court on his post-trial motion for a judgment of acquittal on the grounds of entrapment as a matter of law on the basis of the Appellate Court decision that no ruling had been made on the entrapment as a matter of law question and the defendant's motion for a new trial which had previously been passed over. At a hearing on January 12, 1984, the District Court denied Kelly's motions from the bench without written order or explanation. The trial court, in ruling on the defendant's Renewed Motion For A Judgment Of Acquittal and sentencing, said:

> I lived with it a long time and I don't think you (Kelly) can impress it upon me. I think that what the government did in this case has brought about the downfall of a person who if left alone in all probability would have lived out his lifetime as a law abiding citizen. I think that happened in this case but I can't do anything about it. ...Well, I've talked about the real world situation and I've been rebuffed on that, so I'm not unsympathetic with you and I say again that I think that this tactic has brought about the downfall of you. I don't think there's any possibility of you running into this type of inducement you ran into here. I think you might very well have lived to be one hundred and five and not violated the law. I've travelled that road. I've seen that. (Tr. pp. 63-64 January 12, 1994) (Emphasis supplied).

> He (Kelly) was a lawyer, he was a U.S. Attorney. He was a judge and then he was a Congressman and so he was. So far as we know he served with dedication until he ran into this ploy. ...So far as we know but for that he'd live to be one hundred and five and never disobey the law. (Id. at pp. 77-78).

The defendant was sentenced to not less than six months nor more than eighteen months on one count and was placed on probation for three years on each of the other

counts to run concurrently. The sentence is completed. The defendant is suspended and subject to disbarment pending these proceedings.

The suppression was still in effect. From this ruling and sentence Kelly appealed and the Appellate Court sustained the District Court's decision. (App. E; 748 F.2nd. 691).

The defendant had, just prior to the Appellate Court decision, become aware of the newly discovered evidence, i.e., notice of the intrusion into the defense camp and the suppression of evidence by the government, and had filed a Motion To Defer with the Appellate Court requesting the Appellate Court to remand to the District Court prior to ruling on the defendant's pending motion for rehearing en banc. The Motion To Defer was too late. The decision had been published. The judgment was affirmed before

the Appellate Court became aware of the suppressed evidence and the intrusion.

The defendant then promptly filed motions in the District Court in February and March of 1985 for a new trial and rehearing on defendant's motion to dismiss on due process on the grounds of newly discovered evidence and the violations of the defendant's rights guaranteed by the Fourth, Fifth and Sixth Amendments all involving the government's intentional intrusion into the defense camp, theft of confidential defense documents and disclosure of confidential defense information and suppression of evidence all referring to the same matter previously discussed, supra.

The defendant's motions were all supported with four (4) affidavits made by the intruder, three (3) by the defense counsel and one (1) by the defendant. The government filed its response late with no

affidavits and with the two suppressed documents attached, both dated prior to trial and both in the file of the prosecutor prior to trial. The defendant requested a hearing and discovery and moved to strike the government's response as not timely filed.

At a subsequent hearing on the defendant's filings the defense counsel, as the first item, announced in open court a stipulation and understanding arrived at with the government counsel, whereby it had been agreed the pending defense motions would be heard and disposed of on the pleadings and affidavits which had been filed by the parties prior to the hearing. The trial court tacitly approved and with that understanding the defendant abandoned his motions to strike and for discovery and did not make or renew a motion for an evidentiary hearing. The defendant was at that time represented by an attorney, the senior

member of a substantial firm who had been counsel for the case since the inception, more than five (5) years. Government counsel, in open court, commended the trial court for having given both parties a full opportunity to support their views. The trial judge did not suggest that an evidentiary hearing was required nor order the government to file affidavits but did press the prosecutor for an explanation of the government's failure to do so, with special reference to the government's failure to file an affidavit from FBI informer Mel Weinberg whom the Court referred to at the time as the government's "star performer".

Weinberg's testimony and involvement in the instant case was extensive; he appeared as a witness in both the main trial and the separate due process portion and was a principle witness in the other Abscam cases. His testimony in these other cases was

admitted in the instant case on the due process issues and Weinberg's appearance in and on the audio and video tapes was extensive, and these tapes were the principle feature of the government's evidence. Weinberg's credibility was involved in these areas and also affected the credibility of the testimony of FBI agents and officials who contended they maintained tight control and supervision over Weinberg and Abscam, testimony which was in conflict with the suppressed evidence with Weinberg's contending the opposite.

The trial court stated in open court that if he had had the suppressed evidence of Weinberg's statements to the intruder that he, the trial judge, would "certainly [have] allowed it to impeach [Weinberg's] credibility." This would have been valuable to the defendant but the real value of this suppressed evidence would have been the

impact both with the jury on the entrapment issue and with the Courts on the due process motions.

At the conclusion of the hearing, the District Court denied the defendant's motions without comment, written order or any findings.

The defendant appealed. The Appellate Court reversed and remanded to the District Court (App. D; 790 F.2nd. 130) for its failure to make any findings or to develop any evidentiary record. The matter of the stipulation, upon which the issues had been submitted, that is, the pleadings and affidavits of record on September 19, 1985, the date of the previous District Court hearing, was not raised or referred to or considered by the Appellate Court or the parties on appeal. The stipulation had been agreed to and approved and was not an issue on the appeal.

On remand the government promptly filed a number of affidavits in June of 1986. They were filed more than fourteen (14) months after they would have been timely. The defendant objected and promptly moved to strike the government's affidavits citing the stipulation and the absence of justification for the late filing.

The government affidavits that were ultimately filed constituted a vehicle for an adverse ruling but in fact did not contest the defense evidence:

1) that a government informer intentionally intruded into the defendant's attorney-client conference to obtain confidential defense information for the government;

2) that the prosecutor in the instant case personally, prior to trial, accepted confidential defense information and by his own effort sought and obtained more such

disclosures of information from the intruder (the government affidavits suggested that the prosecutors got involved to investigate a separate crime because the informer reported the defendant had a mole in the Department of Justice who was supplying the defense with information about the government's Abscam operation and the defendant's case; there was no explanation as to why the prosecutors in the instant case would need be involved in the investigation of a collateral crime under the circumstances or why the matter was not presented to the Court);

3) that the intruder was rewarded after the disclosure by a reduced sentence on an unrelated bank robbery charge;

4) that the prosecutor suppressed documents, in his file prior to trial, that would have disclosed all of the evidence

related to the intrusion now before the Court;

5) that the FBI interviewed the intruder in November of 1980, one month prior to trial, at the request of the prosecutor, as a source of information related to the instant case;

6) that the FBI introduced the intruder to FBI informer Mel Weinberg by phone in the FBI office in Miami;

7) that the government agent Mel Weinberg engaged in the conduct and made the statements shown by the evidence.

The government affidavits were a fraud and did not deny the alleged conduct of Weinberg but rather denied such things as agent Weinberg's ability to identify the intruder by photograph as a person he knew when the only evidence is that Weinberg and the intruder's only contact was by phone.

These two agents had never seen one another based on the evidence.

The government affidavits also deny that Weinberg dealt with anyone by the name of Driggers or Davenport when the evidence is that the intruder's official FBI name at all relevant times was Delaney. Driggers was an earlier name that was still in use but the alias Davenport did not come into existence until two (2) years later.

There is no evidence contained in the government affidavits or otherwise that agent Weinberg did not engage in the conduct described in the intruder's affidavits or that agent Weinberg did not communicate or associate by phone with the intruder using the name of Delaney or James D. Delaney as alleged and shown by the evidence.

There is no evidence in this case, contained in a government affidavit or otherwise, that FBI agent Weinberg did not

make the statements attributed to him as shown in the defense affidavits, in association with the intruder using the official name and alias of James David Delaney, given the intruder by the FBI and in use at all times relevant.

The District Court delayed a hearing, in the context of repetitive defense requests for expedition, on the defendant's motion to strike the government's affidavits for eighteen (18) months until December 15, 1987, more than seven (7) years after the events under inquiry, the intrusion, theft, and disclosures and the government's suppression.

By the time of the ruling on the stipulation issue, counsel for the defense had withdrawn, after seven years of service without compensation and the defendant had been suspended from the practice of law for more than seven years and was now pro se.

The defendant under these circumstances, had the choice of pressing for a ruling on his still pending discovery motion, motion to strike the government's total response as not timely filed and to seek or renew his motion for an evidentiary hearing, all of which had been filed nearly three (3) years earlier with the now even more greatly diminished opportunity for discovery and effective adversarial investigation and testing and would require substantial additional delay, which itself constituted prejudice in a system impatient with "successive defense ploys" and "interminable delays". In the present atmosphere of this case, attempting to pursue his motions and discovery rights could have resulted in years of additional delay and prejudice. The defendant for this reason waived any right to his pending motions for discovery and an evidentiary hearing.

The trial court in the context of this hearing again confirmed in open court that it had in fact in May 1982 ruled the defendant to have been entrapped as a matter of law and the trial court believed that there was no remedial action available to the court. The court said:

> You [Kelly] had an absolutely valid defense of entrapment... I ruled post-trial that you had been entrapped as a matter of law. I thought it then; I think it now. But I am bound by the Court of Appeals.

The trial court later in the hearing said: "If it were a bench trial I would have acquitted you before."

The District Court, at the close of the hearing, took the matter under advisement based on the affidavits which now included the government affidavits and did not rule on the defendant's pending motions for a new trial or dismissal of the indictment until

June 29, 1989, at which time it entered its Memorandum and Order. (App. C).

This Order was appealed and, with no oral arguments, the Appellate Court affirmed without a published opinion "for substantially the same reasons" as were in the District Court's Order. (App. A). Therefore, no separate reference is appropriate.

I. The District Court in its 1989 decision stated that the defendant contended that his "Sixth Amendment rights" were violated by "Davenport's intrusion and theft of documents." This reference to the defendant's contention is too narrow. The defendant contends also that disclosure to the prosecutors of confidential defense information obtained by the intruder from the defense camp and the prosecutors' overtly seeking and obtaining additional such disclosures are also elements of the government's conduct violating the

defendant's rights protected by the Sixth Amendment. The defendant also contends that these same rights were violated by the suppression of the documents, the "letter" and the "302", which interfered with the defendant's effective assistance of counsel in that the suppression prevented prompt adversarial investigation and testing related to the intrusion, theft and disclosure for four (4) years plus of the suppression and as extended by the failure of the government to file the government affidavits now before the Court not filed until June of 1986. The District Court in 1989 held:

1) "Under the standards fashioned out of the interpretations of Weatherford v. Bursey, 429 U.S. 545 (1977), the defendant's Sixth Amendment claim must fail "because the prosecutors contend that "they never saw or received any allegedly stolen material from the defendant's office..." This also too

narrowly considers the defendant's position. The defendant's claim is that the evidence shows that there was an intentional intrusion into the defense camp by a government informer and the intruder disclosed confidential defense information, at a minimum that which was contained in the "letter", and the prosecutors then requested additional disclosures from the intruder, which produced at a minimum the disclosures contained in the FBI "302" report. The defendant further contends the intruder caused the stolen documents, stolen during the intrusion, to be transferred to his superior, FBI agent Mel Weinberg, and made no contention that the prosecutors saw the stolen documents or saw them in the form in which they were stolen or identified as such;

2) "the intrusion was not intentional" unless "the prosecution was aware" in ad

vance of the intrusion, or the "prosecution thereafter condoned [the intruder's] conduct" and there was no indication the prosecution was aware until after the fact or condoned the conduct, "so obviously the intrusion was not intentional on its part". (App. C);

3) the evidence did not show any actual prejudice to the defendant resulting from the intruder's activities "insofar as evidence actually introduced" or "any trial tactics" used by the government; the [defendant] "suffered no detriment whatsoever" and "the government acquired no advantage". (Id.)

II. In regard to the defendant's allegation of suppression by the prosecution, the Court concluded the defendant's Brady claim was without merit because:

1) there was nothing of value to the defendant contained in the suppressed docu

ments, the "letter" or the FBI report "nor did they point in the direction of anything that conceivably might have developed for [the defendant's] benefit";

2) "that is to say the evidence was overwhelming" in that it "showed the defendant engaged in the conduct that led to his prosecution", i.e., the video tape of the defendant's activity and the jury rejected the entrapment defense;

3) "that is to say, in the context of this case it is inconceivable" that the intruder's "letter or the FBI report had any potential for affecting the outcome of the trial proceedings";

4) the evidence was overwhelming that the defendant received the money (the Court made no reference to materiality in the context of the specified defenses of entrapment or due process violations nor any reference to the value of the statements of

Mel Weinberg to the intruder which were all suppressed by the government either as evidence or as impeachment material; nor did the District Court make mention in the materiality or the actual prejudice context regarding the questionable value of the verdict due to the Court's continued conviction that the defendant was entrapped as a matter of law or that if it was a bench trial the trial judge would acquit the defendant.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the case involves the suppression of evidence associated with the government's use of intentional intrusion into the attorney-client conferences while preparing for trial. This major progression in this illegal device requires the Court's attention because the suppression device consti

tutes a new element of prosecution involvement and interference with the defendant's effective assistance of counsel in a related but different way. The denial of awareness directly interferes with adversarial investigation and the adversarial process.

The Court's assumption, which at least partially supported the decision in Weatherford, infra does not exist in the suppression and intentional intrusion combination. The ethical quality conceded to the prosecutor is absent. Weatherford at 556-557.[1]

Also, conflicts exist with the decisions of this Court as well as diametric conflicts among the Circuits regarding what

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[1]...suppression was as much a part of the "deliberate deception" as the use of perjured evidence. Pyle v. Kansas cleared away any doubt that existed. Pyle v. Kansas, 317 U.S. 213 (1942). The Prosecutors Constitutional Duty to Reveal Evidence To The Defendant, 64 Yale Law Review Vol. 74:136 (1964).

was implied but not unequivocally decided by this Court. This case also presents a need for the exercise of the Court's power of supervision. This case is more than ten (10) years in the process. There was a trial and four (4) appeals and this is the second appearance here. All but the first appeal brought by the government has been the result of maladministration by the courts or misconduct by the government or both in combination or concert. The judgment of acquittal that was granted along with a dismissal of the indictment post-trial was denied the defendant by the Appellate Court not because it was found to be based on error or was contrary to law, but because the Court of Appeals, misadvised by the government, speculated that the lower court had not ruled post-trial that the

defendant had been entrapped as a matter of law and denied a request to remand.[2] This as the record shows was not correct. In either event it was bad administration to proceed on speculation and the court doing so denied the defendant due process and wrongfully reversed the judgment of acquittal. The matter clearly should have been remanded for clarification.

Since the District Court has confirmed its post-trial ruling, the case should be remanded with instruction that the judgment of acquittal be reinstated (28 U.S.C. 1651) and the defendant discharged or that in the alternative the defendant be afforded a new

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[2]In Kelly I at n.48, the Appellate Court said:

> Kelly contends that the district court also held that he was entrapped as a matter of law. ...we do not interpret Judge Bryant's decision to hold that Kelly was entrapped as a matter of law.

trial unless the indictment is dismissed as a result of these proceedings otherwise.

The judgment below is in conflict with the implicit holding of this Court in United States v. Agurs, infra in that it used as a criteria a matter not an issue in passing on the materiality of the suppressed evidence and ignored the doubtful validity of the verdict because of the District Court's solid opinion the defendant was entrapped as a matter of law rather than on the entire record and the opinion of the trial judge.

This Court, in United Sates v. Agurs, 427 U.S. 97 stated:

> If the verdict is already of questionable validity,additional evidence of relatively minor importance might be sufficient to create a reasonable doubt. ...the trial judge indicated his unqualified opinion that the [defendant] was guilty... after considering [the suppressed evidence] in the context of the entire record the trial judge remained convinced of [the defendant's] guilt beyond a reasonable doubt. Id. at 113-14.

Justice Marshall, dissenting, said:

> ...the defendant... is entitled to relief, in the Court's view, only if the withheld evidence actually creates a reasonable doubt as to guilt in the judge's mind. Id. at 115.

The trial judge in the instant case, at the last appearance of the parties seven years after the trial, said:

> I ruled post-trial that you [Kelly] had been entrapped as a matter of law. I thought it then. I think it now. But I'm bound by the Court of Appeals...

The District Court, based on this ruling, granted the defendant's post-trial motion for a judgment of acquittal on the grounds the government did not prove predisposition and the defendant was entrapped as a matter of law and acquitted the defendant. No Court of Appeals in this case has ever reversed that ruling or the judgment of acquittal because it was contrary to the facts or to the law. The judgment of acquittal was reversed because the Court of

Appeals, misadvised by the government, speculated that no such entrapment as a matter of law ruling had been made.

The trial court at the same 1987 hearing said:

> If it were a bench trial, I would have acquitted you before.

The Judgment below said:

> ...the evidence in this case was overwhelming insofar as it showed that the defendant engaged in the conduct that led to his prosecution. ...the jury rejected the notion [the defendant] had been entrapped.

The defendant at trial did not take issue with the fact of the conduct; the issue was whether the defendant had engaged in the conduct because of entrapment and government conduct constituting due process violations and that the defendant acted without any criminal intent.

The relevant suppressed evidence not referred to in the judgment consisted of out of court statements made by the principle

FBI Abscam agent and informer and the major government witness in the case including that:

1) he had perjured himself numerous times in court;

2) the defendant Kelly was targeted and the FBI did not know "the process and criteria";

3) "Kelly was selected because he was having financial problems and seemed vulnerable".

In passing on the materiality of the suppressed evidence, the failure of the trial judge to even refer to the statements of this government agent wherein he admitted arbitrarily selecting the defendant as an Abscam target and he had committed perjury in court many times and other highly impeaching and damaging statements by implication is a ruling that the prosecutor's obligation to disclose impeachment evidence

is not in the same category as exculpatory evidence and is also in conflict with the decisions of this Court on this issue. United States v. Bagley, 473 U.S. 667 (1985) citing Giglio v. United States, 405 U.S. 150, 154 (1972).

These suppressed statements to the intruder, one FBI agent to another, were clearly information under the control of the government and the prosecution. The judgment below by implication decided that the evidence of these damaging statements were not exculpatory or the government had no obligation to disclose because they were not in the prosecutor's file or both. This decision is in conflict with Brady, Agurs, and Bagley as the statements are clearly exculpatory evidence on the defense issues of entrapment, entrapment as a matter of law, and the due process defenses of government overreaching and overinvolvement in the

creation of crime as well as impeaching material. Bagley, supra. This implication is also in conflict with the Seventh Circuit decision on the necessity of the prosecutor to personally know of or have in his possession or file such evidence when the evidence is in the possession of agencies or agents closely aligned with the prosecution, such as the FBI in the instant case. United States ex. rel. Smith v. Fairman, 769 F.2nd. 386, 391 (7th.Cir.1985). If the lower courts by implication were influenced by any consideration of good faith on the part of the prosecutor, which is unlikely in this factual context, such a consideration would also be in conflict with the Seventh Circuit. Id.

The judgment below applied the actual prejudice test as a basis for denying the defendant's Sixth Amendment claim. This is in direct conflict with the decision of the

Third Circuit. United States v. Levy, 577 F.2nd. 200, 209-10 (3rd.Cir.1978). The Third Circuit stated:

> The government argues that the Supreme Court in Weatherford adopted the actual prejudice test which the district court applied below. We think not... We think that the [Supreme] Court was suggesting by negative inference that a sixth amendment violation would be found where, as here, the defense strategy was actually disclosed or where, as here, the government enforcement officials sought such confidential information. ...the [Supreme] Court certainly did not lay down a rule that when actual disclosure occurred, additional prejudice still must be found.

A reference that fits the instant case quite perfectly. In this context to note that the suppression lasted so long in the instant case the intruder only remembered one of the stolen documents, a defense witness list with a summary of each witness' expected testimony. What the other stolen documents were and what they were used for is only a

matter of speculation which hopefully will not be resolved to the government's advantage.

Inexplicably the judgment below did not mention and is in conflict with the decision in the case of Briggs v. Godwin, 698 F.2nd. 486 (D.C.Cir.1983) where the Court said:

> Moreover, the appellants need not prove that the prosecution actually used the information obtained. The prosecution makes a host of discretionary and judgmental decisions in preparing its case. It would be virtually impossible for an appellant or a court to sort out how any particular piece of information in the possession of the prosecution was consciously or subconsciously factored into each of those decisions. Mere possession by the prosecution of otherwise confidential knowledge about the defense's strategy or position is sufficient in itself to establish detriment to the criminal defendant. Such information is "inherently detrimental, ...unfairly advantage[s] the prosecution, and threaten[s] to subvert the adversary system of criminal justice."[3] Further, once the investigatory arm of the government has obtained informa-

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[3]Briggs footnote #28: Weatherford v. Bursey, 429 U.S. at 556, 97 S.Ct. at 844.

tion, that information may be reasonably assumed to have been passed on to other governmental organs responsible for prosecution. Briggs at 494-5.

The judgment below is also in conflict with a previous decision of this Court which implicitly held that an intrusion into the lawyer-client relationship preparing for trial would be intentional either by the prosecution or some supervisory authority instructing the informer or intruder to intrude into the lawyer-client relationship or the intruding agent could undertake the function on his own initiative. In Weatherford v. Bursey, 429 U.S. 545 (1977), this Court said:

> ...where the state's purpose was to learn what it could about the defendant's defense plans and the informant was instructed to intrude on the lawyer-client relationship or where the informant has assumed for himself that task and acted accordingly... Id. at 557.

Thus, the standard for establishing whether or not a government presence in the attor

ney-client relationship, the defense camp, was intentional was the intent of the government authority initiating the intrusion, be it a supervising authority or the intruder himself. The standard applied by the D.C. Circuit is in conflict in that it holds specifically or implies that because the evidence did not show the prosecutors were personally aware in advance of the intrusion, the intrusion was not intentional. (App. C).

The Tenth Circuit, citing the Ninth Circuit case of United States v. McGregor, 529 F.2nd 928, 931 (9th.Cir.1976) held that although stipulations are generally enforced, the courts are clearly empowered to grant relief to "prevent manifest injustice"; however, prejudice to the opposing party is a factor and the Tenth Circuit clearly implied that the court is not going to or is not authorized to impose a manifest

injustice by relieving a party from a stipulation. United States v. Montgomery, 620 F.2nd 753, 757 (10th.Cir.1980). The judgment below is in conflict with this authority. The government in the instant case was guilty of gross suppression both as to content and time. It filed its response to the defense affidavits late. It filed no affidavits with the late response. Six months after the proper filing time, the government stipulated it would not file affidavits and the issues would be resolved on the pleadings and affidavits filed to the hearing time, and complimented the Court, on the record, for the full opportunity the government was afforded to present its views, and the defendant, based on this stipulation, waived substantial rights to discovery, and to an evidentiary hearing and waived his motion to strike the government pleadings as not timely filed. Also, this

delay left the defendant to proceed pro se. Under these circumstances, the trial court's permitting the government to file affidavits fourteen months later by implication was in conflict with the spirit and intent of the holdings in both the Ninth and Tenth Circuits. In the instant case, the government offered no reason for not timely filing. The Courts' actions have rewarded the government and prejudiced the defendant, now pro se. The violation of this stipulation added to the prejudices suffered by the defendant from the delays and repetitive appeals, which were necessitated by government misadvice, misstatement, misconduct and suppression. The Court's decision to permit the government to violate its stipulation came two years and eight months after the appropriate time for any government filing.

The disposition of the lower courts in their various parts involving the issues of

prosecution misconduct related to the suppression, the intrusion, the stipulation and misadvice to the courts are in conflict with the decisions of this Court in United States v. Ash, 413 U.S. 300, 320 (1972), wherein this Court said:

> The primary safeguard against abuses of this kind is the ethical responsibility of the prosecutor, who, as so often has been said, may 'strike hard blows' but not 'foul ones'. Id.

Citing Brady, 373 U.S. 83, 87-88, the Court further said:

> If that safeguard fails review remains available under due process standards. Ash at 320.

Also see Agurs 427 U.S. at 110-111. These decisions state or imply that misconduct by the prosecution, denying or interfering with the fairness of the proceedings, is a violation of the recognized duty of the prosecutor and that the defendant and the process will be protected by the Court from abuse.

The decisions below dealing with the misconduct of the prosecutors involving the suppression, the intrusion and disclosure of confidential defense information and the stipulation violation and the imposition of delays, if anything, has rewarded this conduct.

In the area of the intrusion, suppression has been added as a part of this device which either masks the intrusion from both the Court and the defendant entirely or prejudices any effort to know the effect depending on the time or duration of the suppression and the details in each case, but in either event the intrusion into the defense trial preparations is rendered more viable and more beyond the control of the Court by the concurrent use of suppression which is itself an ethical abuse. Brady at 87-88, Supra.

The misconduct of the government has fragmented consideration of the case and obscured the relationship of the agents in the field, abusing the police authority by creating crime, and the persecutors abusing courts' process. What is presented here need be considered in the context of the trial court's post-trial memorandum where the court said in part:

> Government agents, hard about the business of corrupting public officials who are free of suspicion, essentially subvert our government; and on its face this presents an unwholesome spectacle. This is particularly true with respect to the manner in which Kelly was handled. Kelly, 539 F.Supp. at 363.

When this conduct includes the use of the courts for its implementation this is classically a basis for this court's concern.

The conduct of the government in this regard and the need for guidance of the court in the area of government intrusion

into the defense preparations and the added device of suppressing urge the attention of the Court in this case.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment of the Court of Appeals in this matter.[4]

Dated: October 17, 1990.

Respectfully submitted,

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Stevensville, MT 59870
(406) 777-3385

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[4]If the Court elects not to address the issues presented in this writ at the present time, it is requested that the writ issue and the matter be remanded to the Appellate Court with instructions to reinstate the Judgment of Acquittal and reconsider the Dismissal of the Indictment in the context of the District Court's post-trial ruling the defendant was entrapped as a matter of law; or this Court as an alternative remand to the Appellate Court with instruction the judgment be set aside and the defendant be granted a new trial.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1989

Criminal Action No. 80-0340-01
No. 89-3125

UNITED STATES OF AMERICA

v.

RICHARD KELLY

Appellant

BEFORE: Silberman, Buckley and D. H. Ginsburg, Circuit Judges

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JUDGMENT

This case was considered on the record on appeal from the United States District Court for the District of Columbia and on the briefs filed by the parties. The court has determined that the issues presented occasion no need for a published opinion. See D.C.Cir. Rule 14(c). It is

ORDERED and **ADJUDGED** that the district court's Memorandum and Order filed June 29, 1989, be affirmed substantially for the reasons stated therein.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C.Cir. Rule 15.

Per Curiam.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1989

Criminal Action No. 80-0340-01
No. 89-3125

UNITED STATES OF AMERICA

v.

RICHARD KELLY,

Appellant

BEFORE: Silberman, Buckley and D. H. Ginsburg, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing, filed June 5, 1990, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 80-340 (WBB)

UNITED STATES OF AMERICA

v.

RICHARD KELLY

FILED
Jun. 29, 1989

MEMORANDUM AND ORDER

Defendant Richard Kelly was charged with bribery and related crimes as a result of the FBI's so-called ABSCAM investigation. After a jury found defendant guilty this court set aside the verdict and dismissed the indictment because it perceived the FBI's tactics as they related to the defendant to be impermissible, and in violation of due process. Our Court of Appeals reversed, reinstated the conviction and remanded. Thereupon this court imposed sen

tence, and its judgment was affirmed by the Court of Appeals. Several months later defendant filed a motion for a new trial in accordance with Fed.R.Crim.P. 33, alleging newly discovered evidence which would substantially affect the outcome of the proceedings against him.

Defendant's motion is supported by several affidavits of a former FBI informant named James Davenport, a/k/a Driggers. According to these affidavits in early 1980 two FBI agents introduced Davenport to Mel Weinberg, the convicted con man who initiated the ABSCAM enterprise. Thereafter Davenport and Weinberg schemed to gain the confidence of ABSCAM defendants, then provide the FBI with information and documents relative to the defenses of the various defendants. Insofar as Kelly is concerned, Davenport states that he contacted Kelly and his

attorney, Anthony Battaglia in Kelly's office, spent considerable time with them discussing Kelly's defense, and stole some documents including a witness list. He also states that the documents were given to Weinberg pursuant to their alleged scheme. Kelly procured the affidavits after learning of Davenport's general activities from a press report.

During discovery proceedings in connection with the new trial motion Kelly learned that prior to his trial in December 1980-January 1981, the U.S. Attorney received a letter from Davenport on October 14, 1980 which mentioned his visit to Kelly's Capitol Hill office and indicated that he had important ABSCAM information, i.e., defendant had an acquaintance who was employed at the Justice Department and furnishing defendant with materials stolen from the government's

ABSCAM files. Kelly also learned that pursuant to that letter Davenport was interviewed by the FBI, and that a report of that interview had been filed on November 7, 1980. Specifically defendant claims that Davenport's intrusion and theft of documents violated his sixth amendment rights; and that the government's failure to turn over Davenport's letter and the FBI report violated his due process rights under Brady v. Maryland, 373 U.S. 83 (1963).

The government filed an opposition to defendant's motion, and it was denied without a hearing. Inasmuch as no evidentiary record was established, the denial of defendant's motion was reversed and the matter remanded. Thereafter extensive papers have been filed, including affidavits made by the then U.S. Attorney and the trial

assistants, and the trial proceedings have been reviewed thoroughly.

Under the standards fashioned out of the interpretations of Weatherby v. Bursey, 429 U.S. 545 (1977), the defendant's sixth amendment claim must fail. Without regard to the affidavits of Weinberg and the FBI personnel, those of the U.S. Attorney and the trial assistants are entirely credible, and to some extent corroborated by the exhibits and the record. All the prosecutors swear that they never saw or received any allegedly stolen material from defendant's office, and had no knowledge of such items until defendant's motion was filed. Significantly, Davenport's letter to the U.S. Attorney makes no mention of any documents taken from Kelly's office. The same is true of the FBI report of its follow-up interview of Davenport.

There is no indication that the prosecution was aware of Davenport's visit to defendant's office until after the fact, or that it thereafter condoned his conduct; so obviously the intrusion was not intentional on its part. Nothing surfaced during the trial that appeared to be linked in any way to Davenport's activities. This is true insofar as evidence actually introduced is concerned, and also in regard to any trial tactics engaged in by the government. It is true that according to Davenport's letter the defendant "acknowledged to me that the only reason he returned the money was because he learned what the FBI had done. He stated that he was set-up and that if it were not for the other people he would not have been caught." However, this statement can hardly be regarded as revealing anything to the prosecution that was not already

perfectly obvious. The defendant had received $25,000 from the FBI undercover agent on January 8, 1980 and returned most of it only after ABSCAM went public in early February of the same year. The court can feel certain that any prosecutor would be aware of the significance of this fact long before receipt of Davenport's letter which referred to the defendant's alleged acknowledgement. In the normal course this would be a matter immediately recognized and targeted for emphasis during the presentation of the government's case and also during cross-examination.

The same analysis can be applied to the alleged statement to the effect that the defendant believed he had been "set-up." It was apparent from the outset of this case that entrapment was a hurdle the prosecution had to clear. It is unlikely that even a

neophyte prosecutor would not be immediately aware of these matters. Needless to say, the government's lawyers in this case were well seasoned and capable. The record clearly reflects that the government acquired no advantage from anything that came out of Davenport's visit to the defendant, and that he suffered no detriment whatsoever therefrom.

The defendant's claim under Brady is without merit. The Brady concept requires the production of any matter which might be exculpatory or otherwise used by defendant to his advantage. Davenport's letter and the FBI report contain nothing of value to the defendant. Nor did they point in the direction of anything that conceivably might have been developed for his benefit. Whether the disputed items qualify as Brady material is not altogether clear. However

the evidence in this case was overwhelming insofar as it showed that the defendant engaged in the conduct that led to his prosecution. The testimony against him was buttressed by video tapes of his activity, and the jury rejected the notion that he had been entrapped.

Upon consideration of the entire record in this case, it is impossible to ascribe any materiality to anything that the defendant claims was evidence withheld from him in violation of Brady. That is to say, in the context of this case it is inconceivable that the Davenport letter and/or the FBI report had any potential for affecting the outcome of the trial proceedings.

The motion for a new trial is denied.

William B. Bryant
Senior United States District Judge

DATE: June 29, 1989

APPENDIX D

United States Court of Appeals,
District of Columbia Circuit.

No. 85-5974

UNITED STATES of America,
Appellant,

v.

Richard KELLY.

Argued Feb. 18, 1986.

Decided May 9, 1986.

Before WALD, SCALIA and STARR, Circuit Judges.

Opinion for the Court filed by Circuit Judge WALD.

WALD, Circuit Judge:

Abscam defendant and former Congressman Richard Kelly appeals from the District Court's denial of his motion for a new trial based on newly-discovered evidence in the form of several affidavits by an FBI informant, James Davenport. Davenport's affidavits state that, in late July or August of 1980, he posed as a disgruntled former FBI

agent, visited Congressman Kelly's office, discussed defense strategy with Kelly and his lawyer, and stole some documents relating to their trial strategy. We find that the District Court's failure to develop an evidentiary record before denying Kelly's motion warrants a remand. Kelly's motion for bail pending appeal is denied.

I. BACKGROUND

This is Congressman Kelly's third trip to this tribunal. Following conviction after a jury trial on bribery and other charges stemming from the FBI's Abscam investigation, the District Court dismissed the indictment against Kelly on due process grounds. This court subsequently reversed the dismissal and reinstated the jury verdict. United States v. Kelly, 707 F.2d 1460 (D.C.Cir.), cert. denied, 464 U.S. 908, 104 S.Ct. 264, 78 L.Ed.2d 249 (1983) [hereinafter cited as Kelly I]. On remand, the

District Court denied Kelly's alternative motions for judgment of acquittal or a new trial and sentenced him, consecutively, to imprisonment for six to eighteen months on the bribery count and three years of probation on the other counts. This court affirmed the conviction on direct appeal. United States v. Kelly, 748 F.2d 691 (D.C.Cir.1984) [hereinafter cited as Kelly II]. Several months later, Kelly filed a motion for a new trial based on the newly-discovered evidence involved in this appeal. That motion was denied from the bench without opinion on September 19, 1985. Kelly began serving his sentence on November 1, 1985.

Kelly's motion for a new trial was filed pursuant to Fed.R.Crim.P. 33 and included several affidavits from former FBI informant James Davenport. In October of 1984, while in prison, Davenport had sworn

out an affidavit for a different proceeding which cited his involvement with the Kelly case as one among many events in an eighteen year life of crime. Oct. 3, 1984, Davenport Affidavit ("Aff."). After learning of the affidavit through a letter from a reporter, Kelly Aff. Para. 14, Kelly contacted Davenport, who subsequently swore out several affidavits for use in Kelly's new trial motion which described a 1980 visit to Kelly's office, conversations with Kelly and his counsel about the forthcoming trial, and Davenport's theft of defense documents during the course of the visit. Davenport's allegations are described in more detail below; the incident described in the affidavits may be briefly summarized as follows:

Davenport first became an FBI informant in a Florida drug investigation in the late 1970's. After being placed in the federal witness protection program, Davenport re-

mained in touch with FBI agents Harold Copus and Russ Duger who, in the early part of 1980, introduced him to another FBI informant, Mel Weinberg. Oct. 3, 1984, Davenport Aff. at 3-15; Nov. 1984 Davenport Aff. Paras. 3-5; Feb. 20, 1985, Davenport Aff. at Paras. 4-9. Weinberg, a convicted con man, worked with the FBI to set up the Abscam operation and posed as the financial adviser for the fictitious Abdul Enterprises. Kelly I, 707 F.2d at 1462 & n. 4; Kelly II, 748 F.2d at 693.

During the spring of 1980, Davenport and Weinberg agreed on a scheme to infiltrate the defense camps of the Abscam defendants, in which Davenport would contact the Abscam defendants and, after identifying himself as a disgruntled ex-FBI informant, offer to testify on their behalf about how Abscam worked. Davenport would also steal information about defense strategies and

turn it over to Weinberg, who would sell it to the FBI. The two men would split Weinberg's bonuses and Davenport's witness fees. Feb. 20, 1985, Davenport Aff. Para. 21.

In accordance with this plan, Davenport travelled to Washington, D.C. in July-August 1980 and, using the name of James Driggers, offered his services to Congressman Kelly. Davenport succeeded in meeting with both Kelly and his attorney, Anthony Battaglia, spending most of the afternoon in Kelly's office discussing Kelly's trial defense strategy, and stealing copies of some legal papers including a witness list. These stolen documents were passed on to Weinberg. Feb. 20, 1985, Davenport Aff. Paras. 22-28; Dec. 5, 1984, Davenport Aff. Para. 3; Kelly Aff. Paras. 7-13; Battaglia Aff. Paras. 6-11. Kelly and Battaglia subsequently decided not to use Davenport's services and

forgot the incident until four years later when they were informed of Davenport's affidavit.

II. MOTION FOR A NEW TRIAL

A. Standards Governing New Trial Motion

[1,2] The Federal Rules of Criminal Procedure allow a motion for a new trial based on newly-discovered evidence to be filed within two years after final judgment. Fed.R.Crim.P. 33. The grant or denial of such a motion is committed to the sound discretion of the trial judge and an appellate court will reverse only if the district court misapplied the law or abused its discretion. United States v. Mangieri, 694 F.2d 1270, 1285 (D.C.Cir.1982). In general, motions for a new trial based on newly-discovered evidence are governed by the five-part test of Thompson v. United States, 188 F.2d 652, 653 (D.C.Cir.1951). Under

Thompson, a new trial will be granted only when five conditions are met:

> (1) [T]he evidence must have been discovered since the trial; (2) the party seeking the new trial must show diligence in the attempt to procure the newly discovered evidence; (3) the evidence relied on must not be merely cumulative or impeaching; (4) it must be material to the issues involved; and (5) of such nature that in a new trial it would probably produce an acquittal.

Mangieri, 694 F.2d at 1285 (quoting Thompson, 188 F.2d at 653). The government contends that Kelly has failed to meet the last three elements of the Thompson test.

The Thompson test does not, however, govern motions for a new trial when the newly-discovered evidence indicates that the original trial was marred by a sixth amendment or Brady violation. In the Brady context, the Supreme Court has substituted a test focusing primarily on the materiality of the undisclosed evidence, with a "reasonable probability" of acquittal as an essen-

tial element of materiality. See infra at 135. In the sixth amendment context, the Court has refused to apply traditional standards governing new trial motions because "[t]he high standard for newly discovered evidence claims presupposes' that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984). In assessing whether a new trial motion adequately alleges a sixth amendment violation, this court has looked not to the Thompson standards but to whether the motion as "set forth evidence upon which the elements of a constitutional[ ] [violation] might properly be found." United States v. Pinkney, 543

F.2d 908, 916 (D.C.Cir.1976).[1] One such element, in the sixth amendment context, is prejudice. See infra at 136-137.

[3,4] Thus, we must evaluate Kelly's factual allegations to assess whether he has made enough of a showing to warrant a new trial or a hearing on his new trial motion. A motion for a new trial can ordinarily be

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[1]Although Strickland and Pinkney involved ineffective assistance of counsel claims, their reasoning applies equally to sixth amendment cases involving government intrusions into the defense camp, since the effect of such intrusions is to deny the criminal defendant effective assistance of counsel. Weatherford v. Bursey, 429 U.S. 545, 554 n. 4, 97 S.Ct. 837, 843 n. 4, 51 L.Ed.2d 30 (1977). Because of the sixth amendment violations, one of the "essential elements of a presumptively accurate and fair proceeding," 104 S.Ct. at 2068, was missing from the first trial in both cases. Thus the Third Circuit has decided a new trial motion charging governmental intrusion into attorney-client confidences on the basis of whether a constitutional violation had been proven, rather than the ordinary test for a new trial. United States v. Costanzo, 740 F.2d 251 (3d.Cir.1984), cert. denied, ___ U.S. ___, 105 S.Ct. 3477, 87 L.Ed.2d 613 (1985).

decided on the basis of affidavits without an evidentiary hearing, United States v. Kearney, 682 F.2d 214, 219 (D.C.Cir.1982), and a district Court's decision not to hold such a hearing may be reversed only for abuse of discretion, United States v. Chagra, 735 F.2d 870, 873 (5th Cir.1984). In the circumstances of this case, however, we find that the District Court's failure to develop any evidentiary record or to make any findings constituted such an abuse.

Kelly's motion for a new trial was based on newly-discovered evidence that, he alleged, demonstrated violations of his sixth amendment rights and his fifth amendment rights under Brady v. Maryland. His motions were supported by affidavits from himself, his attorney, and Davenport. He originally requested a hearing on the motion but withdrew the request after the government failed to contest the relevant factual

issues by submitting counteraffidavits. The government did file an opposition to Kelly's motion denying that Davenport was acting as a federal agent and that prosecutors had seen the stolen documents, but without any accompanying affidavits to back up their denials. The District Court denied Kelly's motion from the bench without explanation.

The District Court abused its discretion by failing to hold an evidentiary hearing or to otherwise resolve the critical factual disputes raised by Davenport's affidavits and the government's negative responses to them. Kelly's affidavits portray his claims "materially and resolutely, and evinc[e], a capability of mounting a serious challenge." United States v. Pinkney, 543 F.2d 908, 916 (D.C.Cir.1976). In the absence of countervailing sworn evidence from the government, Kelly's alle-

gations are--as explained below--sufficient to warrant further factual inquiry.

Although the District Court's failure to adequately develop a factual record is a sufficient ground for our remand, we are also concerned that the trial court may have erred by applying improper legal standards, at least regarding Kelly's sixth amendment claim. A district court's denial of a new trial motion may, of course, be overturned for "'misapplication of the law.'" Mangieri, 694 F.2d at 1285 (citation omitted). The District Court gave no explanation for its denial of the motion, so we cannot be altogether certain of its legal grounds. But since neither party correctly argues the legal standards applicable to the sixth amendment claim in the briefs in our court, we are concerned that the trial court may have been misled on this complicated point. We have accordingly attempted to

provide the court with some legal direction for the proceedings on remand.

B. The Brady Claim

Kelly charges that the government violated his due process rights by failing to provide him with potentially exculpatory or impeaching information as required by Brady v. Maryland, 373 U.S. 83, 83 S.Ct.1194, 10 L.Ed.2d 215 (1963). Specifically, Kelly claims that the prosecution knew about Davenport's intrusion because Davenport had written a letter to the United States Attorney for the District of Columbia mentioning his visit to Congressman Kelly and the FBI had followed up on that letter by questioning Davenport about that incident. Kelly learned about the letter and the FBI agents' report of their interview with Davenport only as a result of his discovery request during the proceedings on his new trial motion.

In opposition to Kelly's Brady claim, government counsel made a series of unsworn representations in its briefs and in open court as to the "true state of affairs" regarding Davenport's letter and the subsequent FBI interview. Government counsel argued that they were not required to reveal information which was fabricated in the first place and which, in any event, they were not aware of at the time of Kelly's trial.[2] The government cannot, however, establish this or any other "true state of affairs" by mere assertions without affida-

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[2]Whether the government was correct as a matter of law in arguing that the prosecution must always know about Brady material in order to give rise to a governmental duty to disclose has not been settled in this circuit. Cf. United States ex rel. Smith v. Fairman, 769 F.2d 386, 391 (7th Cir.185) (prosecutor's ignorance of the existence of the undisclosed evidence does not always justify a failure to produce, "especially ... when the withheld evidence is under the control of a state instrumentality closely aligned with the prosecution, such as the police").

vits. Whether the suppressed information was fabricated and whether the prosecution knew about it during the first trial are issues of fact for the District Court to decide.

[5] These factual disputes warrant a remand; Kelly's allegations are sufficiently meritorious to warrant evidentiary proceedings on his Brady claim. The affidavits and documentary evidence indicate that Davenport wrote directly to the U.S. Attorney for the District of Columbia on October 10, 1980, stating that he had been n the witness protection program, had met with Congressman Kelly and his lawyer, and had important information about Kelly's Abscam case. At a subsequent FBI interview on November 5, the FBI learned that Davenport had been an FBI informant and questioned him about the substance of the meeting with Kelly. Yet neither the letter nor the FBI

report was disclosed to Kelly despite the fact that each document existed during discovery prior to trial and each mentioned Kelly's name over a dozen times. Kelly argued in the new trial proceeding below that the letter and the FBI report would have led him to Davenport and also would have served as evidence of violations of his fourth and sixth amendment rights. New Trial Tr. 19, 28.

[6,7] Because the only argument presented to the District Court in response to these allegations was an unsworn denial of their truth, we find that the District Court's refusal to entertain the new trial motion amounted to an abuse of discretion and the motion must be remanded to the trial court for further proceedings. On remand, the usual standards for a new trial are not controlling because "the fact that such evidence as available to the prosecutor and

not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial." United States v. Agurs, 427 U.W. 97, 111, 96 S.CT. 2392, 2401, 49 L.Ed.2d 342 (1976). Instead, the District Court must determine whether the undisclosed evidence was "material" to Kelly's conviction. Id. at 108-13. The Supreme Court has recently held that undisclosed information is material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, ___ U.S. ___, 105

S.Ct. 3375, 3384, 87 L.Ed.2d 481 (1985).[3] This determination of materiality is inevitable fact-bound and so is committed to the trial judge in the first instance.

C. **The Sixth Amendment Claim**

Kelly contends that his sixth amendment rights were violated when Davenport, a government agent, invaded his defense strategy sessions and stole relevant and impor-

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[3]Prior to Bagley, the standard of materiality had varied with the specificity of the defendant's request for the material. Although the portion of the opinion in Bagley establishing the uniform "reasonable probability standard" was joined only by Justices Blackmun and O'Connor, Justice White's concurring opinion joined by Chief Justice Burger and Justice Rehnquist also cited the "reasonable probability" standard with approval. 105 S.Ct. at 3385. Appellate courts interpreting Bagley have accordingly held that, because a majority of the justices adopted it, the "reasonable probability" standard applies to all Brady requests. United States v. Benn M. Hogan Co., 769 F.2d 1293, 1299 (8th Cir.1985); Lindsey v. King, 769 F.2d 1034, 1041 (5th Cir.1985); United States ex rel. Smith v. Fairman, 769 F.2d 386, 393 (7th Cir.1985).

tant documents.[4] He argues that the fact of the intrusion and theft alone prove a constitutional violation and entitle him to a new trial without any further showing that his first trial was prejudiced in any way by the incident. The government, on the other hand, argues that Kelly must establish the high degree of prejudice embodied in the Thompson new trial standard, which requires a defendant to establish that a new trial will probably produce an acquittal.

[8] Both parties seem to have missed the legal mark as to the applicable legal

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[4]Kelly also asserts that his fourth amendment rights were violated by Davenport's theft of these documents. The usual remedy for illegal searches and seizures, however, is exclusion at trial, United States v. Morrison, 449 U.S. 361, 366, 101 S.Ct. 665, 668, 66 L.Ed.2d 564 (1981), and Kelly has not alleged that any of the stolen evidence was directly or indirectly used at trial. We therefore review the allegedly stolen documents solely in the context of Kelly's sixth amendment allegation.

tandards. Kelly has overlooked the Supreme ourt's decision in Weatherford v. Bursey, 29 U.S. 545, 97 S.Ct. 837, 51 L.Ed.2d 30 1977), and its circuit court progeny which learly establish that some showing of rejudice is a necessary element of such a ixth amendment claim. Conversely, these ases instruct that Kelly's burden of show- ng prejudice to the first trial may not be s great as the government makes it out.

Kelly argues that he need show no rejudice resulting from Davenport's trick- ry because the cases establish a per se ule that any invasion of the attorney- lient relationship by a government infor- ant constitutes a violation of the sixth mendment. He relies primarily on Caldwell United States, 205 F.2d 879 D.C.Cir.1953), which found a sixth amend- ent violation where a federal agent, while osing as an assistant for the defense

counsel, reported frequently to the prosecution on intimate matters of defense trial preparation and strategy. Kelly also cites Coplon v. United States, 191 F.2d 749 (D.C.Cir.1951), cert. denied, 324 U.S. 926, 72 S.Ct. 363, 96 L.Ed. 690 (1952), in which government agents listened in on telephone conversations between the defendant and her attorney. Neither case required prejudice to be shown in order to establish the sixth amendment violations. 205 F.2d at 881; 191 F.2d at 759. Kelly claims that these cases were cited approvingly in Hoffa v. United States, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966) as establishing a per se rule obviating the need to show prejudice in cases involving invasion of defense deliberations. Finally, Kelly cites Black v. United States, 385 U.S. 26, 87 S.Ct. 190, 17 L.Ed.2d 26 (1966), in which the Court sum-

marily ordered a new trial because a federal agent had listened to a defendant's communications with his lawyer.

[9] In Weatherford v. Bursey, however, the Court rejected Kelly's reading of Black and Hoffa as creating a per se rule of presumed prejudice from any governmental intrusion. Bypassing the question of whether Caldwell and Coplon were good law, the Court specifically noted that Hoffa had only assumed their correctness for purposes of making a point in dicta. 429 U.S. at 550-54, 97 S.Ct. at 841-43. Critically, Weatherford went on to make it clear that some prejudice must be shown as an element of a sixth amendment violation. Contrary to the government's position, however, this showing need not rise to the level of proving that a new trial would more likely than not produce an acquittal. See supra at 134 n. 1. Instead, Weatherford and the appel-

late cases interpreting it have assessed several factors in determining whether a criminal defendant whose attorney-client deliberations have been ruptured by a covert government agent has shown the prejudice necessary to make out a sixth amendment violation. From the Supreme Court's discussion of what the defendant in Weatherford had not shown, the lower courts have elicited four so-called Weatherford factors to consider in determining whether a sixth amendment violation has been established: (1) was evidence used at trial produced directly or indirectly by the intrusion; (2) was the intrusion by the government intentional; (3) did the prosecution receive otherwise confidential information about trial preparations or defense strategy as a result of the intrusion; and (4) were the overheard conversations and other information used in any other way to the substan-

tial detriment of the defendant? Weatherford, 429 U.S. at 554, 557, 97 S.Ct. at 843, 844; United States v. Steele, 727 F.2d 580, 585 (6th Cir.), cert. denied, 467 U.S. 1209, 104 S.Ct. 2396, 81 L.Ed.2d 353 (1984); United States v. Brugman, 655 F.2d 540, 546 (4th Cir. 1981).

While the lower courts are in agreement that these are the factors to be evaluated to establish the requisite prejudice, they are far from unanimous on the crucial question of what combination of these factors is necessary to make out a sixth amendment violation.[5] This court has yet to enter

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[5]The Third Circuit is the only court to clearly hold that a sixth amendment violation is established by a showing under any one of the factors. United States v. Costanzo, 740 F.2d 251, 254-255 (3d Cir.1984). Two other circuits have evaluated the Weatherford factors seriatim, implying but not holding that each factor alone can establish a constitutional violation. Clutchette v. Rushen, 770 F.2d 1469, 1471-72 (9th Cir.1985); United States v. Brugman,

(continued...)

the fray. See United States v. Kember, 648 F.2d 1354 (D.C.Cir.1980). In the absence of a concrete factual setting, we decline to do so today.

While we cannot specify with certainty the quantum of prejudice Kelly must establish under Weatherford, however, we are

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[5](...continued) 655 F.2d 540, 546 (4th Cir.1981). Other courts have relied on various combinations of the factors. Two circuits have indicated that an intentional intrusion alone does to establish a violation, unless there is communication of confidential information or some other form of prejudice. United States v. Singer, 785 F.2d 228, 234 (8th Cir.1986); United States v. Steele, 727 F.2d 580, 586 (6th Cir.1984). One circuit has held that when the intrusion is unintentional or intentional but justified a defendant must show both communication of confidential information and resulting prejudice. United States v. Ginsberg, 758 F.2d 823, 833 (2d Cir.1985). Finally, one circuit has held that a defendant must show prejudice when the intrusion is unjustified, but that once the defendant has shown communication of confidential information to the prosecution the burden shifts to the government to show a lack of prejudice. United States v. Mastorianni, 749 F.2d 900, 907-08 (1st Cir.1984).

confident that he has made enough of a factual showing to merit further evidentiary development. Kelly has made no allegations under the first Weatherford factor as to use of tainted evidence, in part because he does not know what documents were taken by Davenport. Davenport's affidavits do, however, make sufficient allegations to warrant additional evidentiary development under the second and third Weatherford factors--intentional intrusion and disclosure of confidential information about defense strategy to the prosecution.

Davenport alleged that he was working as an FBI informant when he was introduced to FBI informant Weinberg through FBI agent Harold Copus in order for Weinberg to teach him "the ends and outs of sting operations." Feb. 20, 1985, Davenport Aff. Paras. 6-9. Weinberg and he developed a plan "to infiltrate the defense teams of the ABSCAM defen-

dants." Id. at Para. 21. Davenport implemented this play by visiting Congressman Kelly's office. Id. at Paras. 22-28. Thus, Davenport's affidavits make adequate allegations under the second Weatherford factor--he and Weinberg were government informants who assumed for themselves the task of "learn[ing] what [they] could about the defendant's defense plans ... and acted accordingly." Weatherford, 429 U.S. at 557, 97 S.Ct. at 844. While the government has represented that Davenport was not, in fact, an FBI informant at this time, it has produced no affidavits from FBI agent Copus or informant Weinberg on which the District Court could have relied to make the necessary finding.

Davenport also alleged that he stole copies of legal papers from Kelly's attorney, including a witness list. Feb. 20, 1985, Davenport Aff. Para. 28. Kelly had

filed the witness list with the District Court for in camera inspection with a motion for a change of venue. The list named all of the witnesses Kelly planned to call along with brief summaries of their proposed testimony. Battaglia Aff. Para. 11; Motion for Change of Venue, attached to Motion for New Trial. Davenport passed the stolen documents along to Weinberg, but never found out what Weinberg did with them. Feb. 20, 1985, Davenport Aff. Para. 28. Later in 1980, while Davenport was in jail, he noticed that Kelly's trial was going on and wrote to the United States Attorney for the District of Columbia, informing him that he had met with Congressman Kelly and his lawyer to discuss Kelly's Abscam case. Oct. 3, 1984, Davenport Aff. at 33; Letter, Appendix B to Opposition to Defendant Kelly's Motion for a New Trial. In response to that letter, FBI agents interviewed

Davenport on November 5, 1980, about his visit to Kelly's office and his allegation that one of Kelly's aides had access to confidential prosecution documents. Oct. 3, 1984, Davenport Aff. at 33; FBI Report, Appendix C to Opposition to Defendant Kelly's Motion for a New Trial. While this evidence does not establish conclusively that the third Weatherford factor has been met--that the prosecution had seen the documents--such a showing would have been nearly impossible for Kelly to make. Davenport's letter to the U.S. Attorney about the incident and his efforts to trace the stolen, confidential documents as far as he could are enough to warrant a sworn response by the government, which is in a far better position to establish that no member of the prosecution team had ever seen the stolen documents.

[10] Given Davenport's allegations, some kind of hearing or other evidentiary process was needed to resolve disputed facts. We therefore see no recourse but to remand Kelly's motion for a new trial to the District Court for further factual development and resolution. Whether the requisite evidence can be developed through affidavits or requires an in-court hearing remains in the sound discretion of the District court. If Kelly demonstrates sufficient prejudice to establish a sixth amendment violation, the government may, of course, defeat the new trial motion by showing that the constitutional violation was harmless error. To do that, the government must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Chapman v. California, 386 U.S.

18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967).[6]

III. MOTION FOR BAIL PENDING APPEAL

Kelly sought a legal furlough from prison to appear on his own behalf at oral

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[6]Thus, the issue of prejudice arises in two distinct contexts in sixth amendment cases, as illustrated by the Supreme Court's recent opinion in Delaware v. Van Arsdall, ___ U.S. ___, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). First, some type of prejudice is an element of the constitutional claim itself. Such prejudice need not, however, be "outcome determinative" or affect the result of the entire trial. The degree of prejudice needed to establish a constitutional claim will vary with the type of sixth amendment violation. Id. at 1436.

In some cases, the court's inquiry will end once the constitutional violation is established. When constitutional errors "are so fundamental and pervasive that they require reversal without regard to the facts or circumstances of the particular case," the error is deemed prejudicial in every case. Id. at 1437. In most cases, however, sixth amendment violations will still be subject to Chapman harmless-error analysis. Id. at 1438. Thus, the prejudice factor will enter the analysis a second time, but this time with the burden on the government to prove, beyond a reasonable doubt, that the constitutional violation was not outcome determinative.

argument and also moved for release on bail pending appeal pursuant to 18 U.S.C. Section 3143(b) (Supp.II 1984). By order dated January 30, 1986, this panel denied the motion for a furlough and deferred consideration of the motion for bail pending appeal and requested expedited consideration of his motion.

[11] Apart from the fact that Kelly's appeal has now been heard and decided, Kelly's bail motion fails because the Bail Reform Act of 19184 does not provide for bail pending appeal of the denial of a new trial motion made pursuant to Red.R.Crim.P. 33. The Act applies only to "a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari." 18 U.S.C. Section 3143(b) (Supp. II 1984). Kelly's motion is not part of a direct appeal but a new trial motion

based on newly-discovered evidence and Section 3143(b) does not apply to an appeal from the denial of such a motion. See United States v. Dansker, 561 F.2d 485, 486-87 (3d Cir.1977) (en banc) (previous bail act does not govern bail pending appeal of denial of new trial motion); Cherek v. United States, 767 F.2d 335, 337 (7th Cir. 1985) (Bail Reform Act does not apply to convicted defendants seeking postconviction relief).

[12,13] Criminal defendants who have exhausted their direct appeals and are serving sentences may seek release while litigating new trial motions based on newly-discovered evidence via a motion under 28 U.S.C. Section 2255 (1982). Dansker, 561 F.2d at 486-87. In a Section 2255 proceeding, "the court's jurisdiction to order release as a final disposition of the action includes an inherent power to grant relief

pendente lite, to grant bail or release, pending determination of the merits." Baker v. Sard, 420 F.2d 1342, 1343 (D.C.Cir.1969); see also Guerra v. Meese, 786 F.2d 414, 417 (D.C.Cir. 1986). A release request in such proceedings will, however, "ordinarily ... be measured against a heightened standard requiring a showing of exceptional circumstances." Baker v. Sard, 420 F.2d at 1343; see Cherek, 767 F.2d at 337 (the power to grant bail pending resolution of a Section 2255 proceeding is to be exercised very sparingly).

Because Kelly has not filed a Section 2255 motion and because Section 3143(b) of the Bail Reform Act is inapplicable to an appeal from the denial of Kelly's new trial motion, neither this court nor the District presently has the authority to release Kelly on bail. His motion for bail pending appeal is accordingly denied.

IV. CONCLUSION

[14] The District Court's failure to develop an evidentiary record and resolve crucial factual disputes renders its denial of Kelly's new trial motion an abuse of discretion. Factual findings are particularly important where, as here, the governmental misconduct charged is extraneous to the trial and so is not documented in the trial record. See United States v. Chagra, 735 F.2d 870, 874 (5th Cir.1984); United States v. Pinkney, 543 F.2d 908, 915 (D.C.Cir.1976). Thus the court in United States v. Disston, 582 F.2d 1108, 1110 (7th Cir.1978), held that a hearing was required on a new trial motion which, like Kelly's, alleged that an intrusion by a government informant into attorney-client meetings violated the sixth amendment. When facially adequate allegations have been made and critical information is more easily avail-

able to the government, an appellate court may order further factual inquiry when "the prosecution without any apparent reason has declined to produce corroborating evidence which the record shows might have been offered." Hamilton v. United States, 140 F.2d 679, 681 (D.C.Cir.1944).

The District Court's denial of Kelly's motion for a new trial is accordingly reversed and remanded for further proceedings in accordance with this opinion. Kelly's motion for bail pending appeal is denied.

So ordered.

APPENDIX E

UNITED STATES of America,

v.

Richard KELLY, Appellant.

No. 84-5035

United States Court of Appeals,
District of Columbia Circuit.

Argued Oct. 2, 1984.

Decided Nov. 16, 1984.

Before BORK and SCALIA, Circuit Judges, and GESELL, District Judge of the United States District Court for the District of Columbia.*

Opinion for the Court filed by District Judge GESELL.

GESELL, District Judge:

Former Congressman Richard Kelly has appealed his conviction by a jury on three counts charging conspiracy to commit bribery and to defraud the United States,[1] brib-

[1] 18 U.S.C. S 371.

ery,[2] and interstate travel to engage in bribery.[3] He primarily contends that the evidence of his entrapment by the Federal Bureau of Investigation was so overwhelming that no reasonably jury could have failed to have a reasonable doubt as to his guilt. After carefully examining the evidence, we have concluded for the reasons set out below that the jury had ample evidence to find that Congressman Kelly was not entrapped. Because all his grounds for appeal completely lack merit, we affirm the conviction.

I. THE FACTS

This Court has already had occasion to summarize the basic facts of this case in United States v. Kelly, 707 F.2d 1460, 1461-67 (D.C. Cir.), cert. denied, ___ U.S. ___,

[2] 18 U.S.C. S 201(c)(2).

[3] 18 U.S.C. S 1952.

104 S.Ct. 264, 78 L.Ed.2d 247 (1983),[4] and United States v. Weisz, 718 F.2d 413, 416-24 (D.C.Cir. 1983), cert. denied, ___ U.S. ___, 104 S.Ct. 1285, 79 L.Ed.2d 688 (1984),[5] and to discuss general background of the FBI Abscam investigation out of which it arose in these and other cases.[6] Only those facts that bear on Kelly's claims on this appeal need be brought into focus here.

[4]The trial court dismissed the indictment against Kelly on due process grounds. 539 F.Supp. 363 (D.D.C. 1982). This Court reversed and reinstated the conviction, leaving open the entrapment issue because it was not addressed in the trial court's ruling. 707 F.2d at 1468 n. 48, 1474-75.

[5]After the jury convicted Congressman Kelly's codefendants, Eugene R. Ciuzio and Stanley Weisz, on the same counts, the trial court granted Ciuzio and Weisz a new trial. They were again found guilty, and their convictions were affirmed.

[6]See, e.g., United States v. Jenrette, 744 F.2d 817 (D.C.Cir.1984); United States v. Myers, 692 F.2d 823 (2d Cir. 1982), cert. denied, 461 U.S. 961, 103 S.Ct. 2438, 77 L.Ed.2d 1322 (1983).

On January 8, 1980, the FBI secretly videotaped Congressman Kelly accepting $25,000 in 100- and 20-dollar bills from an undercover FBI agent at a Washington, D.C., townhouse.[7] The indictment followed.

The aspect of the Abscam investigation leading to this bribe began in 1979 when FBI agent Anthony Amoroso took on the undercover role of one Tony DeVito, president of the fictitious Abdul Enterprises. Me. Weinberg, a convicted confidence man working with the FBI, posed as the organization's financial adviser. Abdul Enterprises purported to represent two wealthy Arab sheiks interested in investing in the United States. In the late summer of 1979, the pair told William Rosenberg, with whom they had had prior dealings, that the sheiks would pay $25,000

[7]The videotape became government Exhibit 2-B at the trial. The transcript of the meeting was government Exhibit 2-C.

for a member of Congress to introduce legislation allowing them to immigrate to the United States. Rosenberg[8] passed the word on to Stanley Weisz, an accountant. Weisz told Eugene Ciuzio, a business associate.

Kelly, a former Assistant U.S. Attorney and Florida Circuit Court judge, was in his third term in Congress when Ciuzio approached him in late November 1979 about helping with an unspecified immigration problem for an unnamed client of Ciuzio's. At the same meeting, the two discussed Kelly's debts. Kelly had first met Ciuzio in October 1979, and he thought Ciuzio, a self-described businessman who had promised to help Kelly earn speaking honorariums, was "a windbag or . . . a crook." Tr. 2616. Nonetheless, Kelly agreed to help.

[8]Rosenberg was later named as an unindicted coconspirator in the Kelly indictment.

Ciuzio met the two principals, Weinberg and Amoroso, in Florida on December 19. Amoroso and Weinberg explained that Kelly would receive $25,000 as a down payment if he promised to introduce immigration legislation on behalf of one of the sheiks.[9] The next evening, Ciuzio telephone Kelly in Washington. At Ciuzio's instructions, Kelly did not speak to Ciuzio from his home or office, but went to a pay telephone at a drugstore a few blocks from his home in suburban Virginia and called back Ciuzio collect.

[9]At this meeting Ciuzio made representations about Kelly's willingness to take a bribe. During Ciuzio's testimony, the trial court cautioned the jury not to consider the conversations at the meeting as evidence against Kelly. Tr. 4255-56. Defense counsel emphasized this exclusion in final argument. Tr. 4666. Accordingly, in weighing the sufficiency of the evidence as to entrapment, we have disregarded that part of the record and of the government's brief. We grant Kelly's motion to strike that part of the government's brief.

On December 23, Kelly and Ciuzio met at an Alexandria, Va., restaurant. According to Kelly's testimony at trial, Ciuzio told him abut two Arabs with an immigration problem who were willing to pay a total of $500,000 for Kelly's assistance. Ciuzio promised that Kelly would receive $25,000 just for attending a meeting with representatives of the Arabs and would receive another $100,000 at the time of providing his official help to the sheiks. The rest of the money would go to Ciuzio, Weisz and Rosenberg. In addition, the Arabs would invest $15 million in central Florida, most of it in Kelly's congressional district, to provide a cover story to explain Kelly's legislative advocacy for them. Kelly testified that he told Ciuzio "I would be glad to" help with the immigration problem but would not accept any money. Tr. 2665-66. However, Kelly agreed to attend a meeting

with the Arabs' representatives, and Kelly assumed that Ciuzio would receive money from the Arabs because Kelly cooperated. Tr. 2697. Kelly recalled telling Ciuzio, "I am glad to do this as a favor to you. If you want to do something for me . . . I have got some real estate that I want to sell and perhaps you can help me find a buyer for that." Tr. 2666. Ciuzio set up the meeting for January 8, 1980.

On that day, Kelly flew from Florida to Washington for a speaking engagement and to attend the meeting arranged by Ciuzio. After meeting Ciuzio, Weisz and Rosenberg at the Madison Hotel,[10] Kelly went with them by chauffeured limousine to the Arabs' townhouse on W Street in Georgetown. Kelly

[10]That was the first occasion Kelly met Weisz and Rosenberg. Kelly testified that he regarded both as dishonest and suspicious characters, but went with them to the townhouse anyway. Tr. 3070-72.

waited in the living room while Ciuzio went into the library with Weinberg.[11] The videotape[12] shows that Ciuzio tried to persuade Weinberg that the money should not be handed to Kelly.

> Ciuzio: Don't hand him no fucking money, don't talk money, tell him what the problem is, how could ya help, he'll explain it ...
>
> . . . . .
>
> Weinberg: Let Tony hand you the money in front of him. Long as we know he's getting the money ...
>
> C: That's ok. But don't say hey, Congressman ... ya know what I mean? Ya can't make him a fucking hood, ya know.
>
> . . . . .

[11]Kelly testified that he feared for his safety at the time and thought that "these people were dangerous." Tr. 2690. Nevertheless, he remained at the townhouse.

[12]The jurors were shown the videotape of the meeting at the townhouse, Govt. Ex. 2-B, and had individual copies of the transcript, Govt. Ex. 2-C, to aid their understanding of what was said.

> W: Let him, let, just put the money on the table and say here, take it ... here Congressman, here's the twenty-five thousand, and that's it, you pick it up.
> C: Go along with that, he knows the answers too.
> W: All right, so ...
> C: I rehearsed with him ...

Government Exhibit 2-C at 3, 10. Weinberg and Ciuzio left the library, and Amoroso and Kelly then met there alone.[13]

Amoroso (known to Kelly as Tony DeVito) explained the proposal for Kelly to introduce immigration legislation on behalf of the two sheiks. The proposal was substantially the same as that made by Ciuzio, except that the second cash payment to be made upon introduction of the immigration

[13]In evaluating the meeting that ensued between Kelly and Amoroso, the jury had the opportunity not only to observe the recollection of the participants on the witness stand, but to study the actual event as it was recorded on videotape, Govt. Ex. 2-B. They could appraise facial expressions, body gestures, tone of voice and other revealing aspects of demeanor not indicated in a bare transcript.

bill was to be $75,000, not $100,000. Amoroso said he realized questions might be raised about why Kelly was acting on their behalf. Kelly immediately responded, "I've got the reason." Ex. 2-C at 13. They agreed the reason would be investment by the Arabs in Kelly's district. Amoroso suggested the investment would take the form of a loan of $10 million to $15 million at favorable interest rates on a land development project designated by Kelly. Kelly responded "All right, I've got the place." Id. at 15. After inquiring about interest rates, Kelly then asked, "Can I level with you?" Id. at 15. The following exchange occurred.

> Kelly: Ok. Here's here's what the thing is. All of this stuff that you've been talking about is umm ahh, I don't know anything about that, I'm not involved with it and it doesn't mae any difference. Th ... the situation that ... that exists that's ahh some kind of business transaction you've got with somebody, but here's

here's what the thing is, umm ahh Gino [Ciuzio] and these guys are my friend ...
Amoroso: A hum.
K: And ahh umm what you said makes a lot of sense to me ...
A: Ok.
K: ... and you can put me out there on the hill, and when you come back in the morning, I'll still be there.

. . . . .

K: So this think will ahh will be helpful to me and ahh umm maybe a ... ... a down the road sometime, you can do me a favor. But in the meantime, whatever these guys are doing is is all right but I got no part in that.
A: I don't ... now I don't I don't follow what you're saying, you got no part in ...
K: In other words, in other words, your arrangement with these people is is all fine. But ahh I'm ahh ahh you have my assurance that what you have told me here, sounds like a good thing and I'm ahh and I will I'll stick by these people.

Id. at 16.

After Amoroso reiterated that he had thought Kelly, not Ciuzio, would take the money, Kelly asked to meet with Ciuzio.

Kelly and Ciuzio then met alone.[14] When Kelly and Amoroso resumed their conversation alone in the library, the following exchange occurred.

> K: Here ... Listen, there's no, there's no problem. I understand the thing, and ahh ahh and I ahh I think that it's ahh, I think's it's a very ahh a very good arrangement and I'm glad to be associated with you. Let's do it.
>
> . . . . .
>
> A: Ok. Well I was under the impression, ok, when, when this thing was set up, ok, that I was gonna give you something ta ... tonight ...
> K: Yeah.
> A: Ok, and that the rest as gonna come ...
> K: Yeah.
> A: ... when you introduce that.
> K: That's right.
> A: Ok, is that is that sti...
> K: Yeah. Here's here's what, here's what the thing is. Umm ahh just simply deal with Gino about it.
> A: Ok. You want me to give him the money huh here?
> K: Sure.

[14]The conversation was not recorded since neither participant consented.

Id. at 22-23. Amoroso agreed to do that, but said it made it seem "you kinda didn't trust me." Id. at 23. Kelly then explained that "what kind of arrangements you got with him, it's ... it's ... it isn't gonna make any difference to you, it makes some difference to me, ok?" Id. at 24. Kelly reassured Amoroso he would perform the services requested by the Arabs.

> K: and and I'm gonna do it just exactly. Now, but here's ahh but here's what the situation is. Umm ahh I am so damn poor you couldn't believe it. I mean if I told you how poor I am, you'd cry. I mean the tears would roll down your ... eyes ...

Id. Amoroso then told Kelly that Ciuzio and the other intermediaries, Rosenberg and Weisz, would be taken care of separately. Kelly said, "It's a very complicated thing ahh to ahh for me ta start dealing in money." Id. at 26. Amoroso responded that that was why he was meeting privately with Kelly.

A: ... and I thought that the best way of doing it was was a one on one between you and I. Now to me that sounds like it was the ... if you're looking for security, I ... I thought that was the best way of doing it.
K: I think so too.
A: Ok ... Then based on that premise, I have it here ... that that what I'm tellin ya [sound of drawer being pulled open] ... I I put this ... I'm not, yea know like I said, I just put the money here.
K: How much is that?
A: Twenty-five thousand dollars ... That's why I told him, I says I thought it'd be easier if I gave it to you myself ... Ya know, to me that sounded th ... the best way of doing it and just between you and I ...
K: I agree.

Id. at 27-28. Amoroso said, "It's up to you." Id. Kelly then picked up the money from the table and began stuffing it in various pockets of his suit jacket and pants while he told Amoroso of a real estate development owned by a friend of his that the Arabs might want to invest in to help Kelly's friend escape an onerous loan. The two then exchanged telephone numbers, with Kelly giving four numbers in Washington and

Florida. Amoroso said he wanted to make sure "you're gonna do it now." Id. at 35. Kelly responded:

> K: No problem.
> A: ... you you will introduce legislation?
> K: We;ll do whatever, whatever, we'll g ... go the route to get it done.
> A: Ok.
> K? Whatever that takes.
>
> . . . . .
>
> A: Ok.
> K: ... but you need to do what ya gotta do.
> A: Ok, if that includes the introduction of the legislation, that's I I that's what we'll do.
> K: It includes ... e ... e ... everything includes everything.

Id. at 35. Kelly took the money home, left it in his car's glove compartment overnight, and took it with him to Florida the next day. He spent part of it during the next few weeks. When the Abscam operation was made public on February 2, 1980, Kelly flew to Washington and turned over the money to the FBI.

At his trial Kelly testified at length that he played along with Ciuzio's proposal to attend the meeting because he was investigating his suspicions that one of his trusted staff members was trying to corrupt him. He told the jury he wanted not money but answers to his questions. Asked why he did not simply walk out of the meeting with Amoroso, Kelly testified:

> Well, if I was going to practice my righteous indignation, I would never have gone to the house on W Street. I went there to try and get some sort of a solution and information, and by me jumping out and walking out of there, I don't think I was going to get it. I felt as though that I had to just hang in there and see what happened.

Tr. 2709.

He eventually took the money, he said, because

> If I was going to go forward with what I was doing [his investigation], I had no alternative but to take the money. And I knew that what I was dealing with didn't involve immigration. I felt as though I had to find out and I was in the best position to find out,

> and that the responsibility to find out was mine. And so I went forward.

Tr. 2713.

On cross-examination Kelly conceded Amoroso had given him the option of whether to take the money.

> Yes. He did after I had refused it 15 times. He said he wasn't going to trust me unless I took the money. And I clearly had the option of just simply backing out of there or taking the money. And I believed the thing for me to do was to take the money, and I did it.
> Q: You decided to take the money; correct?
> A: I did. And it was free will. I did that.

Tr. 3078.

[1] The trial court accurately and without objection instructed the jury on the defense of entrapment.

> Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers or their agents to commit a crime, that person is a victim of entrapment, and as a matter of public policy, the law forbids his conviction in such a case. On the other hand, where a person is predis

> posed to commit an offense ... that is, ready and willing to violate the law at the first opportunity, the fact that these government officials or their agents afford him the opportunities to so does not constitute entrapment.

Tr. 4930. The court went on to define the two key elements of inducement and predisposition and to instruct the jury that it could acquit on this defense only if it found that Kelly had indeed committed the crimes, that he had indeed committed the crimes, that he had been induced to do so, and finally that a reasonable doubt existed as to whether he was predisposed. Tr. 4931-33. We approved such entrapment instructions in United States v. Burkley, 591 F.2d 903, 913-16 (D.C.Cir. 1978), cert. denied 440 U.S. 966, 99 S.Ct. 1516, 59 L.Ed.2d 782 (1979).[15]

[15]As the Supreme Court noted in its most recent decision on the issue, entrapment

(continued...)

The court thus put to the jury two interlocked issues: did the government's behavior go beyond merely offering Kelly the opportunity to break the law, and if it did, was he so predisposed to commit the crime that his predisposition rather than the government's action caused the crime. The jury found Kelly guilty on all counts without a special verdict on these issues, so we cannot know whether the jurors found predis

[15](...continued)

> is a relatively limited defense ... rooted not in any authority of the Judicial Branch to dismiss prosecutions for what it feels to have been "overzealous law enforcement," but instead in the notion that Congress could not have intended criminal punishment for a defendant who has committed all the elements of a proscribed offense, but was induced to commit them by the Government

United States v. Russell, 411 U.S. 423, 435, 93 S.Ct. 1637, 1644, 36 L.Ed.2d 366 (1973). The ultimate issue of the entrapment defense is "the defendant's predisposition to commit the crime." Id. at 433, 93 S.Ct. at 1643.

position or merely no governmental inducement.

II. ANALYSIS

Kelly raises three issues on appeal. First, he contends he should have a new trial on the ground that the jury should have been instructed only to consider whether he was predisposed to commit the crimes, not additionally whether he was induced to commit the crimes, because he had presented sufficient evidence that he had been induced to commit the crimes. In short, he urges that inducement, the other part of the two-part entrapment test, had been established as a matter of law and should not have been submitted to the jury. Second, he contends the district court should have acquitted him on the ground that the evidence refuted predisposition and established entrapment as a matter of law. Third, he contends the weight of the evidence is at least suffi-

ciently contrary to the verdict that he should be granted a new trial in the interest of justice.

A. Entrapment

[2,3] We must first consider whether the trial court should have removed the issue of inducement from the jury, allowing the jurors only to consider his predisposition. Inducement focuses on whether the government's conduct could have caused an undisposed person to commit a crime. See United States v. Jenrette, 744 F.2d 817, 822 n. 7 (D.C.Cir. 1984). It is thus an objective inquiry measuring whether the government's behavior was such that a law-abiding citizen's will to obey the law could have been overborne. If a defendant convinces the jury "that there is some evidence of government inducement," Burley, 591 F.2d at 914 (emphasis in original), the burden then shifts to the prosecution to prove the

defendant's predisposition beyond a reasonable doubt. Id. At that stage, the focus shifts to a subjective inquiry about the particular defendant's state of mind.

The trial court properly defined inducement for the jury in words taken almost verbatim from the jury instruction on inducement that we approved in Burkley, 591 F.2d at 913 & n. 18.[16] There was no ob-

[16]That instruction provides:
Inducement by law enforcement officials may take many forms including persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy or friendship. A solicitation, request or approach by law enforcement officials to engage in criminal activity, standing alone, is not an inducement. Law enforcement officials are not precluded from utilizing artifice, stealth and strat[a]gem, such as the use of decoys and undercover agents, in order to apprehend persons engaged in criminal activities, provided that they merely afford opportunities or facilities for the commission of the offense by one predisposed or ready to commit it. They may properly make use
(continued...)

jection to these instructions. Kelly now continues to press only the objection he raised before the case was submitted to the jury: that the undisputed evidence, even with all inferences drawn in favor of the government, indicates to any reasonable mind that there was "some evidence" of inducement. We disagree.

[4] Kelly contends that the nature of the promises made to him and the manner in which they were made proves "some evidence" of inducement. Specifically, he points among other things to the fact that he was

[16](...continued)

of undercover operations, in which they assume false names and false appearances. They may assume the roles of members of criminal organizations. They may properly offer or give to the defendant the money which is involved in the commission of the crime itself. And they may properly instigate the offer of money to the defendant.

promised $25,000 for initially doing no more than attending a meeting with the Arab representatives, that he was promised an additional $75,000 upon introducing a bill in Congress, that he was offered the chance to designate a third-party recipient of a multi-million dollar loan at low interest, that Amoroso made these blandishments repeatedly, and that eventually the cash as laid out in front of him. The government argues that its behavior amounted to no more than offering Kelly a single opportunity to commit a crime. Reasonable persons could differ as to whether the amount of money offered Kelly and the manner in which the offer unfolded went beyond merely offering Kelly an opportunity to commit a crime.[17]

[17]Although Kelly concedes the evidence at this review should be viewed with inferences drawn in the government's favor, his argument repeatedly does the contrary. For example, his contention that he was offered

(continued...)

The question of how a reasonable person would have reacted is a quintessential jury issue, and the evidence here is not so unequivocal to mandate one conclusion or another. Although the trial court had a personal view that there was some evidence of inducement, Tr. at 1893, 4382, it was scrupulously correct in deciding that a reasonable juror could come to a different conclusion, and it correctly refused to find inducement as a matter of law.

Moreover, we are persuaded there is ample evidence, much of it out of Kelly's own mouth, to support a finding beyond a reasonable doubt that he was predisposed to

[17](...continued)
the cash seven times and the loan 14 times before he succumbed is only one interpretation, and a strained one at that, of what the videotape showed. The jury could reasonably have found instead that there was only a single offer of money that Kelly and Amoroso then discussed in a rambling and repetitious fashion.

commit the three crimes of which he was convicted.

[5] Predisposition is a "state of mind which readily responds to the opportunity furnished by the officer or his agent to commit the forbidden act for which the accused is charged." United States v. Burley, 591 F.2d at 916 (quoting Hansford v. United States, 303 F.2d 219, 222 ID.C.Cir.1962)). Put another way, a predisposed defendant is "presently ready and willing to commit the crime." Burkley, 592 F.2d at 916 (emphasis in original).

[6] The prosecution was required to prove predisposition for each offense charged. For the interstate travel offense, 18 U.S.C. Section 1952, it was required to show Kelly was predisposed to commit bribery at the time he flew to Washington the day of the January 8 meeting. For the conspiracy count, it had to show predisposition in the

overt acts Kelly allegedly committed in furtherance of the conspiracy. Those were the same January 8 trip to Washington, the attendance at the meeting and the acceptance of the money. Predisposition for those counts and for the bribery count itself thus boils down to the question of whether Kelly was predisposed to commit bribery on January 8.

Kelly argues that the only relevant question is his state of mind on December 23, the date when he contends Ciuzio first told him of the corrupt nature of the immigration assistance he was seeking. He contends his lack of predisposition was proven as a matter of law by his rejection of the offer of money on that date.

[7,8] First, the evidence of Kelly's rejection is highly equivocal. The jury reasonably could have concluded that by Kelly's own account, he agreed at the Decem-

ber 23, meeting to attend the January 8 meeting, agreed to be influenced in return for Ciuzio's help in selling real estate for Kelly, and understood that Ciuzio might receive money from the Arabs for Kelly's immigration aid. The caveat that he did not want money himself[18] did not change the corrupt nature of Kelly's agreement.[19] Moreover, Kelly admitted he had called Ciuzio from a telephone booth a few days

[18]This assumes, of course, that one believes Kelly's account of the meeting. The jury obviously was entitled, based on the other evidence that Kelly was interested in financial advantage for himself, to find him without credibility. There was certainly ample basis for the jury to disbelieve anything Kelly said.

[19]It is bribery whether a public official accepts something of value for himself or "for any other person or entity" in return for his being influenced. 18 U.S.C. Section 201(c). The indictment charged that Kelly "did corruptly seek, accept, receive, and agree to receive a sum or money and other things of value for himself and for other persons ..." (emphasis added).

before December 23 to avoid eavesdropping. That is hardly a standard practice for the "unwary innocent" whom the law of entrapment seeks to protect. See Sherman v. United States, 356 U.S. 369, 372, 78 S.Ct. 819, 820, 2 L.Ed.2d 848 (1958). Subsequent events shedding light on his predisposition as of December 23 also refute his contention that there was uncontradicted evidence that he was not predisposed to commit the crimes on December 23. Cf. United States v. Gallo, 543 F.2d 361, 365 (D.C.Cir. 1976) (subsequent acts can be probative of a prior state of mind).

Second, even if Kelly showed no predisposition on December 23, it is simply not the law that predisposition is to be determined based solely on the defendant's reaction to his first encounter with the corrupt offer. If that were so, bribe-takers could immunize themselves from prosecution by the

artifice of always vigorously refusing the initial offer. Rather, predisposition is to be determined, like any state of mind issue, from the entirety of the events surrounding the ultimate commission of the crime. See United States v. Brown, 567 F.2d 119, 120 (D.C.Cir. 1977).[20] An initial expression of reluctance or a refusal to participate in an illegal scheme is of course relevant, see United States v. Borum, 584 F.2d 424, 429 (D.C.Cir.1978), but it is not the only consideration.

[20]Kelly quotes out of context language from United States v. Brown that "[t]he question is whether the events are relevant to and probative of defendant's willingness to commit the crime charged when first solicited to do so by a government agent." Id. at 120 (emphasis added). We were referring in that case to the use of subsequent events to prove a defendant's state of mind at a prior time when he agreed to the agent's solicitation, in other words, to show his predisposition at the time he committed the crime. We intimated no special rule that predisposition is to be determined only as of the time of an initial solicitation.

[9,10] The evidence of Kelly's predisposition is copious. The videotape of the January 8 meeting contradicts Kelly's portrait of repeated and insistent government importunings wearing down his reluctance. The evidence of his reluctance is largely vaporous. From the outset, Kelly showed not the slightest surprise at the initial bribe offer. He registered no shock. He made no protest. Asked if he knew the cover story for his aid to the Arabs, he responded without hesitation, "I've got the reason." Asked if he had in mind where the Arabs could make loans in Kelly's district, he was equally quick to say "I've got the place."

Contrary to his account at trial, and contrary to his repeated assertion in his briefs, Kelly never once at the townhouse meeting rejected his participation in the bribe scheme, much less 15 times as he told the jury from the witness stand. Kelly

coolly puffed on a cigar through much of the meeting, and he repeatedly assured the FBI agent that he would do the bidding of the Arabs. He showed evasiveness and reluctance only at the prospect of physically taking the money directly with his own hands. He showed knowledge and acquiescence that even if he did not take money himself, his "friends" Ciuzio and Weisz[21] would benefit, and that he also expected to benefit later. When the agent assured Kelly that their meeting was private between the two of them, Kelly calmly picked up the money and stuffed it in his pockets as he began telling the agent of a friend to whom he hoped

[21]Kelly testified he had only met Ciuzio a handful of times before the January 8 meeting and that he had not met Weisz until that evening.

the Arabs could make a multi-million dollar loan at low interest.[22]

On his evidence alone, a reasonable jury could only find that Kelly knew what he was getting into when he went to the meeting at the townhouse and that he readily responded to the opportunity presented there. But what is more, Kelly contradicted his own entrapment argument in his testimony.

Kelly told the jury an elaborate--and ultimately bizarre and preposterous--story that he was conducting his own investigation of attempts to corrupt him. He believed these efforts originated from a trusted member of his own staff, yet he never fired

[22]We do not mean, of course, that the actual taking of the money refutes his entrapment defense. The manner in which it was taken and the defendant's demeanor at the time, however, are evidence probative of his state of mind.

this person and continued to give the person important duties. Despite his experience in investigative techniques as a prosecutor and a judge, he never made any independent efforts to find out anything about this alleged plot or to enlist the help of law enforcement officials. He took no notes. He saved no clues.[23] He told no one of his

[23] Kelly explained at trial that
... I studiously avoided any kind of records on any occasion with regard to anything, because I felt as though if I were discovered with any kind of records, I could be as dead as a mackerel....
Q: You were investigating these people, correct?
A: Yes.
Q: With eyes toward exposing them at some time, right?
A: Yes.
Q: And you didn't think it important to make any records of what you were doing?
A: No. I thought it was important that I not make any records because the nature of the investigation that I was undertaking was not to get fingerprints and identification and tire tracks and that kind of evidence. What I was attempting to do was to

(continued...)

suspicions. By his own testimony, his so-called investigation consisted entirely of playing along with the obvious efforts to corrupt him to find out where they would lead. The jury could well have concluded this was the desperate defense of a Congressman caught red-handed, and the jury could have disbelieved all of his testimony accordingly.

[11] Consistent with his story, Kelly did not testify that his will was overborne

[23](...continued)
find out what was the purpose of what appeared to me to be an extensive highly-financed and highly-organized criminal operation that was going to do something that would involve a member of the United States Congress, to wit, me.

by any insistent importunings.[24] Instead, he admitted that he took the money out of "free will," as the videotape clearly demonstrates, but did so with a lack of criminal intent. The jury was entitled to reach the most obvious conclusion: Kelly attended the January 8 meeting and took the money because he was predisposed to be bribed.

B. Weight of the Evidence

Kelly's final argument is that the district court abused its discretion in declining to order a new trial on the ground that the verdict was against the weight of

[24]Kelly, of course, had no obligation to testify in his own behalf. Nor was he precluded from arguing defense theories that a jury might conclude were inconsistent. See Hansford v. United States, 303 F.2d 219, 221 (D.C.Cir.1962). Cf. United States v. Shameia, 464 F.2d 629, 630 (6thCir.1972) (collecting cases from other circuits where defendants not allowed to raise defense of entrapment if they also deny committing the underlying acts constituting the crime). But when he chose to give testimony at odds with the entrapment defense, he ran the risk of undercutting his own case.

the evidence and that a new trial was required in the interest of justice. He concedes that the district court has wide discretion in ruling on such a motion, subject to reversal only if it is a clear abuse of discretion. See United States v. Lincoln, 630 F.2d 1313, 1319 (8th Cir. 1980).

[12] Kelly's sole ground for pressing this claim is that the trial court abdicated its function by finding that the evidence weighed in Kelly's favor but then remarking, "I can't do anything about it." Transcript of Jan. 12, 1984 motion hearing at 63. Kelly's argument seriously distorts the trial court's remarks. It is apparent that the trial judge believed in his own mind that Kelly probably had been entrapped but recognized that a jury could disagree and that the choice was the jury's to make. Because the weight of the evidence clearly

weighs in favor of conviction, not against it, we cannot say that the trial court abused its discretion in refusing a new trial.

III. CONCLUSION

Accordingly, the district court's denial of the motions for judgment of acquittal and for new trial was proper, and the conviction is affirmed on all counts.

Affirmed.

APPENDIX F

United States Court of Appeals,
District of Columbia Circuit.

No. 82-1660.

**UNITED STATES of America,
Appellant,**

v.

Richard KELLY.

Argued Jan. 11, 1983.

Decided May 10, 1983.

Before ROBINSON, Chief Judge, MacKINNON and GINSBURG, Circuit Judges.

Opinion Per Curiam.

Separate Opinion filed by Circuit Judge MacKINNON.

Separate Opinion filed by Circuit Judge GINSBURG.

PER CURIAM:

Judge MacKinnon files an opinion in Parts I, II, III(A) and IV of which Chief Judge Robinson concurs. Judge Ginsburg files an opinion in which Chief Judge Robinson concurs. Thus Parts I, II, III(A) and IV of Judge MacKinnon's opinion together with Judge Ginsburg's opinion constitute the opinion of the court. The judgment appealed from is reversed, and the case is remanded to the District Court with instructions to reinstate the indictment and the verdict of the jury, and for further proceedings.

MacKINNON, Circuit Judge.

The Federal Bureau of Investigation, in an effort to recover stolen art and securities, set up an undercover operation—"Abscam"—designed to catch red-handed those who dealt in such items. In due time the FBI was led to alter the character of the operation to target some government corruption. There-

after several highly placed local, state and national government officials were indicted and convicted. This appeal involves one United States Congressman.

On January 8, 1980, Congressman Richard Kelly accepted $25,000 from an agent of the FBI who was posing as a representative of two wealthy Arabs as part of the FBI's elaborate Abscam investigation. In return, Kelly agreed to use his position in Congress to assist the Arabs to become permanent residents of the United States. Unbeknownst to Kelly, the FBI recorded the entire illegal transaction on video tape.

On the basis of this and other evidence, Kelly and two other individuals, Eugene Ciuzio and Stanley Weisz, were charged with conspiracy to commit bribery, in violation of 18 U.S.C. § 371 (1976), bribery, in violation of 18 U.S.C. § 201(c) (1976), and interstate travel to commit bribery, in violation of 18 U.S.C. § 1952 (1976). A jury found each defendant guitly on all counts. However, the district court granted Kelly's motion to dismiss the indictment, entering a judgment of acquittal in his favor, because it concluded that the FBI's actions in furtherance of Abscam were so outrageous that prosecution of Kelly was barred by principles of due process. *United States* v. *Kelly*, 539 F.Supp. 363, 370-77 (D.D.C. 1982).[1]

Abscam was indeed an elaborate hoax, created by the FBI with the assistance of a convicted confidence man to ferret out corrupt public officials. Nevertheless, we conclude that the government's conduct in Abscam did not reach that "demonstrable level of outrageousness" which would bar prosecution of the corrupt officials that were uncovered, particularly given the difficulties inherent in their detection. *Hampton* v. *United States*, 425 U.S. 484, 495, n. 7, 96 S.Ct. 1646, 1653 n. 7, 48 L.Ed.2d 113 (1976) (Powell, J., concurring). Accordingly, we reverse the district court and remand with instructions to reinstate the indictment and the jury's verdict.

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[1] The district court granted a new trial to Ciuzio and Weisz. *United States* v. *Kelly*, *supra*, 539 F.Supp. at 377-78. Both were convicted on all counts at their second trial.

I. FACTS

A. *The Abscam Investigation*

In the spring of 1978, the FBI's Long Island office began an undercover investigation with the initial goal of recovering stolen art and securities.[2] The code name for this investigation was "Abscam," a name derived from Abdul Enterprises, the name of a fictitious FBI-created organization which ostensibly represented two Arabs of considerable wealth interested in "investing" in the United States.[3] Convicted confidence man Melvin Weinberg was enlisted by the FBI to assist in the creation and operation of Abscam.[4] Weinberg played the role of financial advisor to Abdul Enterprises, while FBI agents "held" other positions in that organization.[5] Beginning in Janu-

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[2] Trial Transcript (Tr.) at 1442-43, 1559-60, 3361-62, 3552.

[3] Tr. at 3589-91.

[4] From 1968 until 1976, Weinberg had operated an illegitimate business known as London Investors. Weinberg, claiming to represent wealthy investors, promised to arrange loans in exchange for "loan origination fees" *paid in advance*. Tr. at 1554-55, 1665-69. Of course, Weinberg never arranged the loans, but rather absconded with the fees.

Weinberg was arrested by the FBI in 1976 for his London Investors activities and, in 1977, pled guilty to mail and wire fraud charges brought in the United States District Court for the Western District of Pennsylvania. Tr. at 1555, 1669-71. In exchange for his cooperation in four organized crime cases, the FBI interceded on Weinberg's behalf before the district court. As a result, Weinberg was sentenced to three years probation and permitted to return to New York to assist the FBI. Tr. at 1555-57, 1673-74, 3546-51. Thereafter, Weinberg assisted the FBI in Abscam, which was modeled after his successful London Investors scheme. Tr. at 1690-93, 3552, 3589-91. Beginning in August 1978, Weinberg received $1000 per month—raised in 1979 to $3000 per month—for his Abscam work. Tr. at 1028-30, 3546-51.

[5] Tr. at 3374-75.

ary 1979, Anthony Amoroso, a special agent for the FBI, assumed the role of president of Abdul Enterprises.[6]

Initially the FBI made it known on the streets that Abdul Enterprises had money to invest and waited to be approached with proposals.[7] Abdul Enterprises turned away individuals offering legitimate transactions, but maintained contact with those suggesting illegal activity. In November 1978 Abdul Enterprises was approached by two businessmen, William Rosenberg and William Eden, concerning the possibility of financing certain equipment to be leased to the City of Camden, New Jersey. It appeared that the transaction would require payment of a bribe to Angelo Errichetti, then Mayor of Camden.[8] Thereafter the focus of Abscam shifted to political corruption and organized crime.[9]

On July 26, 1979, Mayor Errichetti, who had since been introduced to the Abscam agents by Eden and Rosenberg,[10] and Howard Criden, a Philadelphia lawyer and associate of Errichetti, met with Weinberg and Amoroso on a yacht in

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[6] Tr. at 1021-22, 3444-45.

[7] Tr. at 1690-92. As Weinberg explained, "we had a big honey pot and all the flies came to it." Tr. at 1691.

[8] Tr. at 1709-14, 3373-78.

[9] Tr. at 1442-43, 3458-59. In December 1979 Mayor Errichetti met with the representatives of Abdul Enterprises and boasted that "he could control" Atlantic City. He later indicated that a bribe of $300,000 to $400,000 would guarantee a gambling license. Tr. at 1715, 3596-98. Errichetti ultimately *led Abscam* to a number of other corrupt public officials. *See United States* v. *Myers*, 692 F.2d 823 (2d Cir. 1982); *United States* v. *Jannotti*, 673 F.2d 578 (3d Cir.) (en banc), *cert. denied*, ___ U.S. ___, 102 S.Ct. 2906, 73 L.Ed.2d 1315 (1982). In March 1979 Abscam uncovered corruption in the Immigration and Naturalization Service. Tr. at 1252-53. *See United States* v. *Alexandro*, 675 F.2d 34 (2d Cir.), *cert denied*, ___ U.S. ___, 103 S.Ct. 78, 74 L.Ed.2d 75 (1982).

[10] Tr. at 1209, 1443-44, 3458-59, 3597-98.

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Florida to discuss financing for a proposed casino that a client of Criden wished to build. During the day Amoroso and Errichetti discussed the problems that might face the wealthy Arabs who controlled Abdul Enterprises should an Iranian-type revolution occur in their country and they sought to come to the United States as permanent residents. Amoroso enlisted Errichetti's assistance in obtaining the "cooperation" of public officials and suggested that money would be no problem. Errichetti and Criden agreed and, on August 22, 1979, introduced the Abscam agents to Congressman Michael Meyers, who accepted $50,000 in exchange for his promise to assist the wealthy Arabs.[11] Thus was introduced the "asylum scenario"—whereby members of Congress were paid bribes to ensure that they would introduce private immigration legislation on behalf of the wealthy Arabs if and when necessary—which ultimately caught Kelly.[12]

B. *Abscam's Introduction to Kelly*

On September 10, 1979, Weinberg met with Rosenberg and sought his aid in locating politicians willing to assist his Arab employers to become permanent residents of the United

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[11] *United States* v. *Myers*, 527 F.Supp. 1206, 1210-12 (E.D.N.Y. 1981), *aff'd*, 692 F.2d 823 (2d Cir.1982); Tr. at 1748-51, 3463-68; Due Process Transcript (Due Process Tr.) at 180-83.

[12] There is some dispute as to who created the asylum scenario. The district court concluded that it "was conceived—lock, stock, and barrel—by Weinberg and made its first appearance on July 14, 1979. . . ." *United States* v. *Kelly*, *supra*, 539 F.Supp. at 366 & n. 10. *See* Joint Appendix at 344, 354-67. The government, on the other hand, asserts that Amoroso conceived of the asylum scenario on July 26, 1979, as he cruised by former Nicaraguan dictator Somoza's yacht. Due Process Tr. at 180-81. Insofar as is relevant to this case, the asylum scenario was the suggestion of a government agent—either Amoroso or Weinberg—and not of Kelly.

States.[13] Weinberg outlined the assistance required, indicating that the Arabs would pay $25,000 to a member of the House of Representatives and $50,000 to a member of the Senate for their promise of future assistance. Weinberg suggested that Amoroso would "talk one and one and make the guy safe" at the time of the payoff.[14] In October 1979 Rosenberg related the proposal to a business associate and accountant, Stanley Weisz. Rosenberg told Weisz that the Arabs needed immigration assistance and that Weisz would receive a fee for the proper introductions.[15]

On November 22, 1979, Weisz, while on vacation in Boynton Beach, Florida, met with his longtime business associate, Eugene Ciuzio.[16] During their conversation, Weisz related the Arabs' need for immigration assistance to Ciuzio. Ciuzio replied that he knew a congressman who might be willing to help the Arabs and indicated he would check with him and get back to Weisz.[17] In fact, Ciuzio had never discussed immigration

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[13] Transcript of Meeting of Sept. 10, 1979, at 1-5, 7; Tr. at 890-92, 1088-92, 1443-44, 1565-66, 1570-71, 1740-44. Although Amoroso and Weinberg suggested that Rosenberg "reach out" to politicians as early as August 24, 1979, this was in the context of their request for assistance in obtaining New York gambling licenses. Transcript of Meeting of Aug. 24, 1979, at 7-8; Tr. at 1078-80B. The asylum scenario was not mentioned to Rosenberg at the August meeting.

[14] Transcript of Meeting of Sept. 10, 1979, at 2-3, 7; Tr. at 891-92, 1090-92, 1570-71.

[15] Tr. at 1488-89, 3851-53, 3953-55. Although Rosenberg introduced Weisz to Amoroso and Weinberg at a meeting on September 12, 1979, the asylum scenario was not discussed with Weisz at that time. Tr. at 886-87, 1569-70, 3942-43.

[16] Ciuzio had referred a friend to Weisz for assistance in a federal tax matter. The purpose of the meeting was to provide Weisz with the details of that dispute. Tr. at 3855-63.

[17] Tr. at 1488-89, 3855-63, 3958-60, 4106-07.

matters with Kelly, having first met Kelly on October 1, 1979, in an Orlando restaurant.[18]

Ciuzio promptly arranged to meet with Kelly at the Tampa airport on November 23, 1979. At that meeting Ciuzio told Kelly that he had some Arab clients with immigration difficulties and asked Kelly if he could help them. Kelly indicated that his office handled such matters routinely and that he would be glad to assist the Arabs, particularly since Ciuzio indicated they might invest in his district.[19] Ciuzio informed Kelly that he—Ciuzio—would receive a large fee if Kelly helped the Arabs; Kelly told Ciuzio that the fee would cause no difficulties.[20] Ciuzio promptly called Weisz from the Tampa airport and indicated that Kelly would be happy to help the Arabs.[21]

In mid-December 1979 Weisz informed Rosenberg of Ciuzio's friendship with a Florida congressman who was willing to help the Arabs.[22] On December 16, 1979, Rosenberg called Weinberg and told him that he had a "candidate" who would assist with the Arabs' immigration problems. Rosenberg indicated that the individual was a congressman from Florida, that he wanted $250,000, and that payment would have to be on "an escrow basis." Weinberg suggested that the Congressman be paid $25,000 down, with the balance paid when legislation was required. Rosenberg agreed to set up a meeting with the Congressman at Abdul Enterprises' Wash-

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[18] Tr. at 1995-97, 2022-24, 2610-15, 4099-102.

[19] Tr. at 2656-61, 2844-45, 4109-11, 4198-99. Kelly testified that immigration problems were "handled as a staff matter." Tr. at 2661. Kelly had "no recollection or record that [he] was involved in any [immigration] cases." Tr. at 2660-61.

[20] Tr. at 2844-45, 4109-11, 4198-99. Kelly admitted that he also discussed the amount of his indebtedness with Ciuzio. Tr. at 2844-45.

[21] Tr. at 3866-67, 3958-60, 4113-14.

[22] Tr. at 3869-72.

ton, D.C., townhouse on January 8, 1980.[23] Rosenberg Weisz and told him of Weinberg's positive response. e Rosenberg Ciuzio's telephone number and agreed Ciuzio to ask him to contact Weinberg.[24] On December 17, 1979, Rosenberg again called Weinberg and explained that Weinberg would be contacted by "a fellow by the name of Gino [Ciuzio] who will handle all the arrangements for you and who will give you the person."[25]

On December 19, 1979, Amoroso and Weinberg met with Ciuzio in Hollywood, Florida, and explained the assistance that would be expected of the Congr*[illegible]* *Ciuzio indicated that the individual was Congressman Richard Kelly and intimated that he and Kelly had had previous dealings of a similar nature.*[27] Ciuzio suggested that he told Kelly of the offer and claimed that Kelly left the arrangements to him. Ciuzio opposed direct payment to Kelly and suggested that the money instead be escrowed through Weisz.[28] Amoroso assured him that a private meeting between nd Kelly would protect the Congressman, and that y Arabs would invest in Kelly's district to provide an explanation for Kelly's

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[23] Transcript of Telephone Call of Dec. 16, 1979, at 5-9, 12-13.

[24] Tr. at 3869-72.

[25] Transcript of Telephone Call of Dec. 17, 1979, at 1.

[26] Transcript of Meeting of Dec. 19, 1979, at 11-12, 14, 22.

[27] *Id.* at 16, 38-39. Referring to Kelly, Cuizio asserted:

> Not that I'll ever use it on em, of cou[illegible] 'm just saying uh umm. *He's in.* Ya know, we were h[illegible]is for a long time. now he's pregnant, ya understand. *He's already takin' money* so we're married and thats all.

Id. at 39 (emphasis added).

[28] *Id.* at 16, 18-19, 26, 30, 34-35.

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assistance.[29] Weinberg made it clear that the meeting and payment of $25,000 was to assure the Arabs that Kelly

> got the money [and] when we're ready to move that he is gonna be with us.[30]

Ciuzio agreed to "lay out the story" for Kelly.[31]

On December 21, 1979, Ciuzio telephoned Weinberg and suggested a January 8, 1980, meeting with Kelly. Ciuzio reiterated that he and Weisz did not want to have the money handed directly to the Congressman.[32] Weinberg insisted that Kelly be directly involved in the transaction, but indicated that

> [a]ll he [Amoroso] wants the Congressman [to do] is to tell him what he's gonna do for him for the money.[33]

Ciuzio agreed, but requested that they use "the right script, nice and soft."[34]

On December 23, 1979, Ciuzio met Kelly at a restaurant in Alexandria, Virginia, and explained the proposal. *Kelly testified* that Ciuzio told him that

> there were two Arabs that were going to come into the United States and there was concern that they would have an immigration problem, and that if they did, they wanted to be assured that they would have some assistance from a person with some authority and that in this connection, a

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[29] *Id.* at 18-19, 34-35.

[30] *Id.* at 33.

[31] *Id.*

[32] Transcript of Telephone Call of Dec. 21, 1979, at 2-4, 9-10. Earlier, Cuizio told Weinberg that he asked Kelly to call him from a public phone booth "that would be safe," rather than from his congressional office, to discuss the transaction. Kelly did, in fact, call Cuizio from a phone booth located a few blocks from his home in Virginia. Transcript of Telephone Call of Dec. 20, 1979, at 2; Tr. at 2685-86, 4265-70.

[33] Transcript of Telephone Call of Dec. 21, 1979, at 13.

[34] *Id.*

representative of these Arabs was prepared to pay a half a million dollars for this assistance. And that the arrangements would be that the two Arabs may not come into the country, but that their representatives wanted to have a meeting.

They wanted to be sure that in the event they needed something, that they would have established a relationship, a contact that would cause this assistance to be available. And in this connection, that they would pay $25,000 just as earnest money . . . *I would receive $25,000 just for going to the meeting*, and nothing would be expected of me, and then if at a later time there developed that there would be some need, then I would be expected to render this assistance and that *I would receive at that time an additional $100,000*, and the rest of the money was to be paid to [Ciuzio, Rosenberg, and Weisz] . . .[35]

Ciuzio also told Kelly of the Arabs' intention of investing substantial sums in the districts of cooperative congressmen.[36]

Kelly agreed to go to the meeting and give his assurances that he would help the Arabs, despite the fact that Ciuzio, Rosenberg, and Weisz would be paid as a result. However, Kelly testified that he refused to accept money for doing so:

I would be glad to do it. But as far as my receiving any money for doing it, I just simply didn't want to do that. There wasn't any need to.

There was no problem. It was a standard procedure and that I would not accept any money . . . I said, . . . I will do that. You can depend on me, I will go to the [h]ouse and we will give these assurances to the representatives. . . .

I am glad to do this as a favor to you. If you want to do something for me . . . I have got some real estate that I want to sell and perhaps you can help me find a buyer for that.[37]

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[35] Tr. at 2663-64 (emphasis added). Cuizio denied that he told Kelly of the proposal at their meeting, although his testimony was equivocal. Tr. at 4126-31, 4302-05.

[36] Tr. at 2664-65.

[37] Tr. at 2665-66.

C. Abscam's Payoff to Kelly

Shortly after 10:00 p.m. on January 8, 1980, Kelly, Ciuzio, Rosenberg, and Weisz arrived at Abdul Enterprises' Washington, D.C., townhouse to meet with Weinberg and Amoroso. Initially Weinberg met with Ciuzio, who vigorously sought to disuade Amoroso from attempting to bribe Kelly directly.[38] The two ultimately agreed that Kelly would acknowledge that the money was in exchange for his agreement to assist the Arabs, but that Ciuzio would actually take the money from the meeting:

> WEINBERG: You can be in with him, all right?
>
> CIUZIO: Well I think I should be here to, ahh steer the f____ing thing . . .
>
> WEINBERG: Let him, let, just put the money on the table and say here, take it . . . here, Congressman, here's the twenty-five thousand and that's it, you pick it up.
>
> CIUZIO: Go along with that, he knows the answers too.
>
> WEINBERG: All right, so . . .
>
> CIUZIO: I rehearsed with him.[39]

After this conversation Kelly and Amoroso met privately. Amoroso explained the Arabs' immigration difficulties and

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[38] Transcript of Meeting of Jan. 8, 1980, at 1-11. Ciuzio said, "Don't hand him no f____ing money, don't talk money, tell him what the problem is. . . ." *Id.* at 3. Later Ciuzio and Weinberg had the following exchange:

> WEINBERG: Well, he knows he's getting money right?
>
> CIUZIO: He ain't taking no f____ing money in his hand.
>
> WEINBERG: All right, youl'll take it.
>
> CIUZIO: All right.
>
> WEINBERG: he'll hand it to you.

Id. at 4.

[39] *Id.* at 10.

their willingness to pay to have "friends" in Congress when required. He also indicated that the Arabs would invest in their "friends' " districts in order to protect them from pressure.[40] Kelly's response revealed that he was aware of the purpose for the investments.

> AMOROSO: Now I realize that ahh there's a possibility that ahh if, if you were to introduce something like this, that ahh, people would ask, well why is he doing it, ya known, well what's the reason, now . . .
>
> KELLY: I've got the reason.
>
> AMOROSO: OK, what . . . would that be . . . investing?
>
> KELLY: Sure.[41]

Kelly agreed to assist the Arabs, and, as recorded on the video tape, indicated that Amoroso's arrangement with Ciuzio was fine:

> All of this stuff that you've been talking about . . . *I don't know anything about that, I'm not involved with it* . . . Gino and these guys are my friend[s] . . . what you said makes a lot of sense to me . . . I'm gonna stick with ya . . . *and you can put me out there on the hill, and when you come back in the morning, I'll still be there* . . . So this . . . will be helpful to me and . . . maybe . . . down the road sometime, you can do me a favor. *But in the meantime, whatever these guys are doing is all right, but I got no part in that* . . . In other words, . . . your arrangement with these people is . . . all fine. . . . [Y]ou have my assurance that what you have told me here, sounds like a good thing and . . . I will . . . stick by these people.[42]

After Amoroso received a call from Assistant United States Attorney Jacobs who was monitoring the meeting and who thought Kelly was being "cute," and after Kelly conferred with

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[40] *Id.* at 11-13.

[41] *Id.* at 12-13.

[42] *Id.* at 16 (emphasis added).

Ciuzio,[43] Amoroso sought to clarify Kelly's position. Kelly made it clear that he wanted the money given to Ciuzio:

> KELLY: [Y]ou and I gotta . . . learn to talk to each other.
>
> AMOROSO: Well I know . . .
>
> KELLY: [D]on't stumble around, jump in there . . .
>
> AMOROSO: Jump in there and give it to you?
>
> KELLY: Sure.
>
> AMOROSO: Ok. I was under the impression . . . when this thing was set up . . . that I was gonna give you something . . . tonight . . .
>
> KELLY: Yeah.
>
> AMOROSO: Ok, and that the rest was gonna come . . .
>
> KELLY: Yeah.
>
> AMOROSO: when you introduce that.
>
> KELLY: That's right.
>
> AMOROSO: Ok, is that, is that still . . .
>
> KELLY: Yeah. Here's . . . what the thing is. Umm ahh just simply deal with Gino [Ciuzio] about it.
>
> AMOROSO: Ok. You want me to give him the money . . . here?
>
> KELLY: Sure.[44]

However, when Amoroso indicated that all of the money was intended to go to Kelly, and that Ciuzio would be separately compensated, Kelly was confused:

> I understood that what you were talking about was . . . all there was as far as Tony [sic, should be Ciuzio] was concerned and so as far as I'm concerned, he takes that . . . [B]ut I see I didn't know . . . about this other arrangement. . . . It's . . . all right but I didn't know about that. So lets talk about it some.[45]

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[43] Tr. at 1104-09, 1173-76, 1181-82, 1392-93, 1412-14, 2207-08, 2870-72, 4145-47.

[44] Transcript of Meeting of Jan. 8, 1980, at 22-23.

[45] *Id.* at 24-26.

Amoroso explained that he thought that giving the money directly to Kelly would avoid witnesses, thus protecting him. Kelly agreed:

> AMOROSO: I thought that the best way of doing it was . . . a one on one between you and I. Now to me that sounds like . . . if you're looking for security . . . the best way of doing it.
>
> KELLY: I think so too.[46]

Amoroso then gave Kelly $25,000 in cash and Kelly stuffed the money into the pockets of his suit.[47]

II. THE DISTRICT COURT DECISION

In ruling on Kelly's motion to dismiss the indictment and to set aside the verdict of the jury, the district court acknowledged the need for undercover investigative technique to detect "diabolical criminal conduct so sophisticated as to be nearly impossible to detect," but concluded that

> as Abscam affected Kelly, it was not the type of carefully devised and supervised covert operation generally accepted by the courts. In many respects it differed sharply from traditionally accepted types of operations.

United States v. *Kelly, supra*, 539 F.Supp. at 371. The district court complained that the asylum scenario was not triggered by any suspicion of corruption in government and that, unlike ordinary, passive sting operations, it utilized legal and illegal bait promoted by a "recruiting agent" "to persuade the Congressman to become a sting patron." *Id.* The district court concluded that the sole purpose of the asylum scenario was to test the virtue of members of Congress. *Id.* at 373.

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[46] *Id.* at 26-27.

[47] *Id.* at 28-30.

The district court admitted its personal distaste for the concept of law enforcement agencies testing the virtue of congressmen, but held, assuming that such activities were proper,

> the application of the testing procedures in this case patently exceeds the outer limits of any concept of fundamental fairness.
>
> The litmus test—or temptation—should be one which the individual is likely to encounter in the ordinary course. To offer any other type of temptation does not serve the function of preventing crime by apprehending those who, when faced with actual opportunity, would become criminals. Instead, it creates a whole new type of crime that would not exist but for the government's actions.
>
> When improper proposals are rejected in these virtue-testing ventures, the guinea pig should be left alone. *In ordinary real life situations, anyone who would seek to corrupt a Congressman would certainly not continue to press in the face of a rejection for fear of being reported and arrested.* The FBI of course had no such restraints in this case.

Id. at 373-74 (emphasis added) (footnote omitted).

The district court found that Kelly rejected the bribe offer at his meeting with Ciuzio on December 23, that Ciuzio informed the Abscam agents of that fact at the townhouse on January 8, and that Kelly initially rejected the bribe in his meeting with Amoroso. *Id.* at 374. Accordingly, the district court concluded

> that in the circumstances of this case, any further pursuit and pressure on the part of government agents was nothing short of outrageous. . . . If the government had no knowledge of Kelly doing anything wrong up to his rejection of illicit money, its continuing role as the third man in a fight between his conscience and temptation rises above the level of mere offensiveness to that of being "outrageous." *No concept of fundamental fairness can accomodate what happened to Kelly in this case.*

Id. at 376 (emphasis added).

III. ANALYSIS

The Due Process Defense

The district court concluded that the FBI's conduct in furtherance of Abscam was so outrageous that prosecution of Kelly was barred by principles of due process.* The Supreme Court has recognized that there may be situations

> in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely

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* contends that the district court also held that he was entrapped as a matter of law. Brief for Appellee at 74-78. Although the district court did submit Kelly's entrapment defense to the jury, Tr. at 4929-34, we do not interpret Judge Bryant's decision to hold that Kelly was entrapped as a matter of law. Rather, our review of the record reveals that the district court in fact thought that Kelly had not aggressively pursued his claim of entrapment. Tr. at 3294-95, 4417; Due Process Tr. at 70-71, 216. Judge Bryant recognized that it would be difficult for a public official such as Kelly to pursue an entrapment defense:

> I know its tough for a man to come in and say, "Well, I got into a situation and I was overborne with temptation and I succumbed." I know it's tough for him to say that. This man is in public life and that kind of thing.

Tr. at 3295. *See also United States* v. *Kelly*, *supra*, 539 F.Supp. at 377 n. 58. Furthermore, the mere fact that a judgment of acquittal was entered in Kelly's favor does not indicate that the district court ruled Kelly was entrapped as a matter of law. Kelly's own request for a judgment of acquittal on due process grounds belies any such assertion. Tr. at 1855A-55F; Due Process Tr. at 74. Accordingly, there is no need to address Kelly's contention that the double jeopardy clause of the Fifth Amendment prohibits the government's appeal of the post-verdict, judgment of acquittal in this case. *See generally United States* v. *DiFrancesco*, 449 U.S. 117, 130, 101 S.Ct. 426, 433, 66 L.Ed.2d 328 (1980); *United States* v. *Singleton*, 702 F.2d 1159 at 1161-1162 (D.C.Cir.1983).

> bar the government from invoking judicial processes to obtain a conviction . . . .

United States v. *Russell*, 411 U.S. 423, 431-32, 93 S.Ct. 1637, 1642-1643, 36 L.Ed.2d 366 (1973).[49] More recently, a divided Court reaffirmed that due process principles might foreclose prosecution of a predisposed defendant if the government was excessively involved in his criminal activity. *Hampton* v. *United States*, *supra*, 425 U.S. at 495, 497, 96 S.Ct. at 1652, 1653 (Powell, J., concurring) (Brennan, J., dissenting). However, Justice Powell, in his critical concurring opinion, stated:

> I emphasize that the cases, *if any*, in which proof of predisposition is not dispositive will be rare. Police overinvolvement in crime would have to reach a *demonstrable level of outrageousness* before it could bar conviction. *This would be especially difficult to show with respect to contraband offenses, which are so difficult to detect in the absence of undercover Government involvement* . . . . [Law] [e]nforcement officials therefore must be allowed flexibility adequate to counter effectively such criminal activity.

Id. at 495, n. 7, 96 S.Ct. at 1653 n. 7 (Powell, J., concurring) (emphasis added).

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[49] The Court cited *Rochin* v. *California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952), apparently as an example of the type of outrageous government activity which would bar prosecution under principles of due process. In that case, the Court found that actions of police officers, who broke into the bedroom of the defendant, attempted to pull drug capsules from his throat, and, finally, forcibly pumped his stomach to retrieve the capsules, violated due process. *Id.* at 166, 172, 72 S.Ct. at 206, 209. The Second Circuit has read this citation to indicate that due process will bar a prosecution only if the government's conduct directly invades some personal right of the defendant. *United States* v. *Alexandro*, 675 F.2d 34, 40 (2d Cir), *cert. denied*, ___ U.S. ___, 103 S.Ct. 78, 74 L.Ed.2d 75 (1982); *Archer* v. *Commissioner of Corrections*, 646 F.2d 44, 46-47 (2d Cir.), *cert. denied*, 454 U.S. 851, 102 S.Ct. 291, 70 L.Ed.2d 141 (1981).

Our task in this case, therefore, is to assess whether the FBI's conduct in Abscam reached a "demonstrable level of outrageousness," while keeping in mind the difficulties inherent in detecting corrupt public officials. *Id.*; *United States* v. *Russell*, *supra*, 411 U.S. at 432, 93 S.Ct. at 1643. Measured against this standard, the FBI's conduct did not violate due process.

B. *Abscam*

Abscam was indeed an elaborate hoax, involving a fictitious, FBI-created corporation purportedly representing Arabs of enormous wealth, as well as the limousines, yachts, and lavishly appointed residences necessary to make the hoax believable. Yet stripped of these trappings of wealth, Abscam was no more than an "opportunity for the commission of crime by those willing to do so." *United States* v. *Myers*, 692 F.2d 823, 837 (2d Cir.1982). Amoroso and Weinberg let it be known that they would pay substantial sums of money to congressmen willing to promise to assist the wealthy Arabs with their immigration difficulties. Thereafter, the FBI operatives simply waited for the grapevine to work and to see who appeared to take bribes. No congressmen were targeted for investigation; rather, Abscam pursued all who were brought to the operation by the grapevine.[30] In essence, then, Abscam was *not* significantly different from an undercover drug or fencing operation

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[30] Tr. at 1096-98, 1237-39, 1255-57, 3656-58, 3726-28. However, not all officials brought to Abscam were offered bribes. The Abscam operatives recognized that they had no control over the representations made by intermediaries such as Ciuzio, Rosenberg, and Weisz. Tr. at 1237-39, 3656-58. Accordingly, the FBI *always* discussed the asylum scenario with the officials prior to the offer of a bribe. Tr. at 3726-28. That was certainly the case with Kelly; Amoroso carefully discussed the details of the asylum scenario with Kelly *before* any bribe money was paid. *See* discussion at 28 *infra*. In one instance, where his discussion revealed that the official was unaware of the corrupt nature of the proposal, the FBI terminated the meeting. Tr. at 1422-25, 3288-91.

offering to buy from all who appear at its door.[51] Instead of buying stolen goods or contraband drugs, Abscam bought cor-

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[51] The district court concluded that Abscam was unlike ordinary, "passive" undercover operations because it used "recruiting agents" to spread the word that bribes were available. *United States* v. *Kelly, supra*, 539 F.Supp. at 371. I disagree. I seriously doubt that the government would establish an undercover drug or fencing operation without spreading the word, through informants and criminal elements (labeled "recruiting agents" by the district), that its services were available. The Abscam investigators did no more.

My colleagues ter[illegible]m an extraordinary operation. *Infra*, at 1474-1476. It wa[illegible]only in the positions of some of the individuals involve[illegible]ntangible nature of the "commodity" purchased. Otherwise, it is strikingly similar to ordinary undercover operations. To conclude otherwise suggests a lack of familiarity with changes in the law enforcement activities of the FBI since the death of J. Edgar Hoover in 1972. *Final Report of the Select Committee to Study Undercover Activities of Components of the Department of Justice*, S. Rep. No. 682, 97th Cong., 2d Sess. 39 (1982). Hoover was an advocate of keeping FBI activities "of an open character not in any manner subject to criticism." *Id.* at 35. He resisted efforts to get the FBI into drug enforcement because it would have required that FBI agents become involved in "unsavory" undercover operations, but was forced by presidential directive to allow undercover FBI activities in defense intelligence matters during World War II. *Id.* at 36-37. Following Hoover's death his successor, Clarence M. Kelly, with the support of Congress, and pursuant to widespread public demand, began to move the FBI into "big cases" involving *white-collar* and organized crime. *Id.* at 40-41.

Initially, the FBI, in cooperation with local law enforcement authorities, established undercover fencing operations, gaining valuable experience in undercover techniques "that avoided claims of entrapment." *Id.* at 40. Thereafter, the FBI's undercover activities have expanded to include "investigations of white-collar crimes, political corruption, personal and property crimes, and racketeering crimes." *Id.* at 43. The FBI now also has responsibility to investigate violations of the criminal drug laws of the United States. 28 C.F.R. § 0.85(a) (1982). Unfortunately, the government cannot select the nature of the crimes that will be committed and the detection of many

upt official influence in Congress. Such government involvement in crime does not violate principles of due process.

We need not determine the ex... limits on government involvement in crime imposed by the due process clause for it is

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of these "big" crimes require highly sophisticated undercover operations. Congressional appropriations for such undercover activity have increased substantially, from $1 million for 53 operations in 1977 to $4.5 million for 463 operations in 1981. *Id.* at 42. Thus, although large FBI undercover operations might once have been characterized as extraordinary, such operations are now clearly part of the FBI's routine activities and their legality is not destroyed by their imaginative character.

My colleagues also criticize the failure of the FBI to closely supervise the Abscam operation. *Infra*, at 1474-1475. To the extent that this criticism extends to the non-FBI middlemen, such as Ciuzio, Rosenberg and Weisz, involved in Abscam, their activities could hardly be "supervised" because they did not know Abscam was an undercover investigation. The FBI took ...derable precautions to compensate for its inability to contro... ...epresentations of the middlemen. *See* note 50 *supra*.

Finally, my colleagues appear to criticize the amount of money and other benefits offered by Abscam to Kelly. *Infra*. at 1477. In my view the sums offered were not unreasonable or "outrageous," particularly if it is remembered that Abscam was dealing with corruption of high government officials and historically in such cases substantial payments are made. Examples are legion: *United States* v. *Jannotti*, 673 F.2d 578, 598-99 (3d Cir.) (en banc), *cert. denied*, ___ U.S. ___, 102 S.Ct. 2906, 73 L.Ed.2d 1315 (1982) (bribery of member of Philadelphia City Council; payments in range of $10,000 to $30,000 not excessive); *United States* v. *Manton*, 107 F.2d 834, 840-44 (2d Cir. 1938), *cert. denied*, 309 U.S. 664, 60 S.Ct. 590, 84 L.Ed. 1012 (1940) (bribery of circuit judge of United States Court of Appeals for the Second Circuit; payment in Depression dollars totaling over $188,000; payments ranged from $11,500 to $60,000); *Fall* v. *United States*, 49 F.2d 506, 512 (D.C.Cir.), *cert. denied*, 283 U.S. 867, 51 S.Ct. 657, 75 L.Ed. 1471 (1931) (Tea Pot Dome scandal; bribery of cabinet officer; payments of large amounts of government bonds and "loan" of $100,000, worth at least $1 million today); *United States* v.

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clear that the FBI's involvement in Abscam was less than that government involvement found unobjectionable by the Supreme Court.[32] In *Hampton*, the defendant asserted that a government informant suggested the defendant could make money by selling drugs, supplied the defendant with drugs, and provided the purchasers—who were also government agents—of those drugs. *Hampton* v. *United States*, *supra*, 425 U.S. at 486-87, 96 S.Ct. at 1648. Justice Brennan characterized the government's activity as "doing nothing less than buying contraband from itself through an intermediary and jailing the intermediary." *Id.* at 498, 96 S.Ct. at 1654 (Brennan, J., dissenting). Similarly, in *Russell*, a government agent provided the defendant with a scarce chemical essential for the unlawful manufacture of methamphetamine, and purchased the illicit product. *United States* v. *Russell*, *supra*, 411 U.S. at 424, 93 S.Ct. at 1639.

In each of these cases the government not only provided an *opportunity* to commit a crime, but also provided the *means* to commit that crime. Nevertheless, in each case the Supreme Court concluded that the government's conduct did not violate

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Williams, No. 81 CR 269 (N.D.Ill. May 1981) (conspiracy to bribe United States Senator from Nevada; offered Las Vegas property valued at approximately $1.6 million at $200,000 discount; *see* N.Y. Times, Oct. 22, 1982, at A18, col. 1). Many other cases could be cited but no more are necessary to establish that the sums offered Kelly were not "in excess of real-world opportunities" even though that is not the test. *Infra*, at 1477. Had they been Kelly would have become suspicious and would have shied away. That the bait was taken here is the best evidence that it was within the "real world" of the Congressman, i.e., that his "price" was estimated correctly.

[32] For this reason, we need not decide the validity of the due process test formulated by the district court—whether the temptation offered is "one which the individual is likely to encounter in the ordinary course." *United States* v. *Kelly*, *supra*, 539 F.Supp. at 374. It is suggested, however, that criminal conduct being as highly varied as it is that such test is unduly speculative.

due process. *Hampton* v. *United States*, *supra*, 425 U.S. at 485, 490-91, 96 S.Ct. at 1648, 1650; *id.* at 491-92, 96 S.Ct. at 1650-1651 (Powell, J., concurring); *United States* v. *Russell*, *supra*, 411 U.S. at 424-25, 93 S.Ct. at 1639. Where, as in Abscam, the government simply provides the opportunity to commit a crime, prosecution of a defendant does not violate principles of due process. This conclusion is in accord with decisions of the Second and Third Circuits upholding Abscam convictions challenged on due process grounds. *United States* v. *Williams*, 705 F.2d 603 (2d Cir.1983); *United States* v. *Myers*, 692 F.2d 823 (2d Cir.1982); *United States* v. *Alexandro*, 675 F.2d 34 (2d Cir.), *cert. denied*, ___ U.S. ___, 103 S.Ct. 78, 74 L.Ed.2d 75 (1982); *United States* v. *Jannotti*, 673 F.2d 578 (3d Cir.) (en banc), *cert. denied*, ___ U.S. ___, 102 S.Ct. 2906, 73 L.Ed.2d 1315 (1982).[53]

C. *Specific Claims*

1. *Reasonable Suspicion*

Nor do any of the specifically challenged FBI actions in furtherance of Abscam reach that "demonstrable level of outrageousness" which would bar Kelly's prosecution. The district court stressed that Abscam's asylum scenario was not triggered by any suspicion of corruption in government. *United States* v. *Kelly*, *supra*, 539 F.Supp. at 371. Yet prior to setting the asylum scenario in motion, Abscam had uncovered evidence of official corruption in New Jersey[54] and in the Immigration and Naturalization Service.[55] Prior to enlisting

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[53] The Third Circuit's decision in *Jannotti* is particularly significant because it held that *United States* v. *Twigg*, 588 F.2d 373 (3d Cir. 1978), the only post-*Hampton* case to uphold a due process challenge to prosecution because of excessive government involvement, did not control its consideration of Abscam. *United States* v. *Jannotti*, *supra*, 673 F.2d at 608-10 & n. 17. Thus Kelly's reliance on *Twigg* is misplaced.

[54] *See* note 9 *supra*.

[55] *United States* v. *Alexandro*, *supra*, 675 F.2d at 36-38.

Rosenberg's aid in the asylum scenario, the Abscam operatives had seen at least one congressman accept a bribe for immigration assistance. *United States* v. *Myers*, *supra*, 692 F.2d at 830-31. Finally, prior to the January 8 meeting with Kelly, the Abscam operatives had evidence from which they could conclude that Kelly was, in fact, corrupt. Ciuzio stated as much in his meeting with Amoroso and Weinberg on December 19.[56] Furthermore, *Ciuzio told Weinberg on December 20 that he asked Kelly to call him from a "safe" phone booth to discuss the transaction; that Kelly did so was strong evidence for the Abscam operatives that Kelly was fully aware that he was participating in an illicit transaction.*[57] Thus, the FBI had ample suspicion of corruption to justify pursuing the asylum scenario and Kelly, if such suspicion was necessary.[58] In assert-

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[56] *See* note 27 *supra*. Contrary to the statements of my colleagues and the district court, not all of Ciuzio's statements regarding Kelly were clearly false. *See infra*. at 1474-1475 n. 1; *United States* v. *Kelly*, *supra*, 539 F.Supp. at 367. Ciuzio told the Abscam agents that Kelly needed the bribe money "to straighten his whole life out" because he had used "a little f____ing money he ain't supposed to use. . . ." Transcript of Meeting of Dec. 19, 1979, at 17. Kelly admitted that he had discussed the amount of his indebtedness with Ciuzio at their meeting at the Tampa Airport on November 23, although he offered no explanation why he discussed his personal finances with a man he was meeting for only the third time. *See* note 20 *supra*. This conversation provides evidence that Ciuzio spoke truthfully when he told the Abscam agents that Kelly intended to use the money from the illicit transaction to pay his debts.

[57] *See* note 32 *supra*. *Kelly admitted* calling Ciuzio from a public phone booth at Ciuzio's request. Tr. at 2685-86.

[58] Although we need not decide the question, both the Second and Third Circuits have rejected the argument that the government must have reasonable suspicion of wrongdoing before proceeding with an undercover operation such as Abscam. *United States* v. *Jannotti*, *supra*, 673 F.2d at 608-09; *United States* v. *Myers*, 635 F.2d 932, 941 (2d Cir), *cert. denied*, 449 U.S. 956, 101 S.Ct. 364, 66 L.Ed.2d 221 (1980).

ing the contrary, my colleagues, without explanation, fail to give a common sense interpretation to the uncontradicted evidence in the record. *See* Sep. Op., *infra*, at 1 n. 1. Members of the federal judiciary have no power to veto law enforcement practices merely because such practices offend their personal tastes. *Cf. Hampton* v. *United States*, *supra*, 425 U.S. at 490, 96 S.Ct. at 1650 (entrapment); *United States* v. *Russell*, *supra*, 411 U.S. at 435, 93 S.Ct. at 1644 (same).

2. ***Utilization Of Weinberg***

It is submitted that Kelly's argument that the FBI violated due process by utilizing the services of an admitted confidence man, Melvin Weinberg, in Abscam should likewise be rejected. Successful creation of an "elaborate hoax" such as Abscam may well *require* employment of "experts" such as Weinberg to give the operation an aura of "credibility" and "contracts" with criminal elements. The employment of a convicted confidence man in Abscam is analogous to the entirely proper employment of a convicted seller of drugs to purchase drugs from a suspected distributor. As the Second Circuit stated:

> [U]se of dishonest and deceitful informants like Weinberg creates risks to which the attention of juries must be forcefully called, but the Due Process Clause does not forbid their employment, detail their supervision, nor specify their compensation.

United States v. *Myers*, *supra*, 692 F.2d at 846. In this case, Weinberg's checkered background and dubious credibility were brought before the jury through vigorous cross-examination. The jury was entitled to consider Weinberg's testimony and give it such weight as it found appropriate. In my view there was no error of constitutional dimension in the FBI's use of Weinberg's services in Abscam.

3. ***Failure To Memorialize Conversations***

Similarly, Kelly's claim that the FBI violated due process by failing to record or memorialize every conversation between Weinberg and Kelly's codefendants is without merit. At trial,

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only *Weisz* seriously challenged Weinberg's version of an unrecorded conversation—a five minute telephone conversation with Weisz on December 21, 1979.[59] Kelly had the benefit of Weisz"exculpatory" version of this conversation at trial[60] and has failed to explain how any of the other unrecorded conversations would have added anything of significance to his defense. The FBI operatives successfully recorded the vast majority of their communications with Kelly and his codefendants, including all but one of their critical conversations.[61] The FBI's occasional failure to record Abscam conversations does not constitute a due process violation.[62]

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[59] Tr. at 3791-94, 3798-802, 3810-11. There was apparently only one other significant unrecorded conversation between Weinberg and Kelly's codefendants—an eleven minute telephone conversation between Weinberg and Ciuzio on December 18, 1979. Tr. at 1276-77, 1282-84, 1615-18. Amoroso testified that he did not prepare a memorandum on that conversation because their meeting with Ciuzio the following day allowed him to bring out everything discussed in that conversation. Tr. at 1276-77. *See* Tr. at 1053-54, 1058.

[60] Tr. at 3857-77.

[61] I suspect that Kelly is more upset with Abscam's considerable success in *recording* conversations than with its occasional failures in that regard.

[62] *See United States* v. *Myers*, *supra*, 692 F.2d at 846.

Kelly's reliance on a line of cases requiring government *preservation and production at trial of notes and tapes created during an investigation* is inapposite. *See United States* v. *Bundy*, 472 F.2d 1266 (D.C.Cir.1972) (per curiam); *United States* v. *Bryant*, 439 F.2d 642 (D.C.Cir. 1971). In those cases we dealt with

> the legal consequences of *intentional non-preservation by investigative officials if highly relevant evidence*, colored by clear reluctance even to admit that the evidence ever existed at all.

United States v. *Bryant*, *supra*, 439 F.2d at 647 (emphasis added). We have subsequently held that the government is not required to preserve or produce insignificant or irrelevant evidence. *United States* v. *Bowles*, 488 F.2d 1307, 1313 (D.C.Cir. 1973), *cert. denied*, 415 U.S. 991, 94 S.Ct. 1591, 39 L.Ed.2d 888 (1974). Kelly does not

4. Multiple Bribe Offers

Finally, Kelly contends that the FBI operatives violated due process when they persisted in offering a bribe after what he characterizes as his initial rejection. Kelly asserts that he rejected the bribe at his meeting with Ciuzio on December 23, that Ciuzio informed Amoroso and Weinberg of that fact at the townhouse on January 8, and that he rejected the bribe several times in his meeting with Amoroso. Kelly argues, and the district court agreed, that under these circumstances Amoroso's several bribe offers to Kelly were outrageous and violated due process. *United States* v. *Kelly*, *supra*, 539 F.Supp. at 374-76. I cannot agree.

The evidence in this case clearly demonstrates that at no time did Kelly reject Abscam's corrupt immigration proposal. On both December 23 and January 8, Kelly agreed to assure the wealthy Arabs that he would help them with their immigration problems as a favor to Ciuzio, despite the fact that Kelly knew that in return the Arabs would pay substantial sums to Ciuzio, Rosenberg, and Weisz.[63] It is also clear that Kelly understood that part of the arrangement was that the Arabs would make substantial investments in his district.[64] Such agreements, which would benefit Kelly indirectly, constitute violations of the bribery statute.[65] Furthermore, the discussions between Ciuzio, Kelly, and the Abscam operatives at the townhouse of January 8 focused on the *manner* in which

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assert that the Abscam operatives deliberately destroyed recordings of the conversations at issue; he merely claims that Weinberg failed to record them. Nothing in the *Bryant* line of cases suggest that the government is required to *create* documentary evidence of all conversations.

[63] Transcript of Meeting of Jan. 8, 1980, at 16; Tr. at 2661-66, 2848-57.

[64] Transcript of Meeting of Jan. 8, 1980, at 12-13, Tr. at 2664-65.

[65] *See* 18 U.S.C. § 201(c) (1976). The district court so instructed the jury. Tr. at 4920.

the bribe would be paid, not on whether it would be paid. Ciuzio told Weinberg not to bribe Kelly directly, but agreed that he would take the money for Kelly.[66] After agreeing that Amoroso was going to give him some money at the meeting, Kelly asked Amoroso to pay the bribe to Ciuzio—to "deal with [Ciuzio] about it."[67] In my view, Congressman Kelly "did not reject a bribe, he [initially] rejected its payment under circumstances he feared would be incriminating." *United States* v. *Myers*, *supra*, 692 F.2d at 838.[68]

I likewise reject Kelly's characterization of his conversation with Amoroso on January 8 as a *series* of bribe offers. Although the terms of the corrupt Abscam proposal were mentioned several times during that converstion, Amoroso's discussion reflects the evasive and circumspect negotiation to be expected of a person seeking to corrupt a public official. In my view, Amoroso's conversation with Kelly on January 8 can be fairly characterized only as a *single offer* of a corrupt proposal to Kelly.[69] For these reasons I reject kelly's contention that he

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[66] Transcript of Meeting of Jan. 8, 1980, at 1-11. *See* notes 38-39 and accompanying text *supra*.

[67] Transcript of Meeting of Jan. 8, 1980, at 22-23. *See* text accompanying note 44 *supra*.

[68] In *Myers*, the Second Circuit considered the appeal of Congressman Frank Thompson, who first met Amoroso and Weinberg on the morning of October 9, 1979. At that meeting Thompson rejected Amoroso's offer of money and left. After further discussions with an intermediary, Howard Criden, Thompson again met with Amoroso, agreed to assist the wealthy Arabs, and asked Criden to "look after" the $50,000 offered by Amoroso. Criden carried the money from the meeting. *United States* v. *Myers*, *supra*, 692 F.2d at 832-33. On these facts, which in many respects are more favorable to a due process defense than those in Kelly's case, the Second Circuit rejected Thompson's claim that the FBI violated due process by offering a bribe after his initial rejection of the bribe at the first meeting. *Id.* at 838.

[69] *See* Tr. at 1125-31, 1178-79.

intially rejected a bribe, that the Abscam agents persisted in offering him a bribe, and that they thus violated due process.

IV. CONCLUSION

Like the district court,

> we like to think, and we hope, that our Congressmen and Senators, and indeed all public servants, are strong enough to withstand any imaginable pressure and reject any type of temptation no matter how attractive, and walk away. . . . But in reality, *the hard fact is that our public servants* are not recruited from the seminaries and monastaries across the land and that they *are plagued by the frailties of human nature.*

tes v. *Kelly*, *supra*, 539 F.Supp. at 375 (emphasis cause of this fact and because dishonest public officresponsive more to money than to their obligations to the nation, may cause grave harm to our society, we recognize the need for law enforcement efforts to detect official corruption. Furthermore, such corruption is "that type of elusive, difficult to detect, covert crime which may justify Government infiltration and undercover activities." *United States* v. *Alexandro*, *supra*, 672 F.2d at 42 (footnote omitted).[70]

The Supreme Court has made it clear that "a successful due process defense must be predicated on *intolerable government conduct* which goes beyond that necessary to sustain an entrapment defense." *United States* v. *Jannotti*, *supra*, 673 F.2d at 607 (emphasis added). Considering the genuine need to detect corrupt public officials, as well as the difficulties inherent in doing so, we conclude that the FBI's conduct in furtherance of its Abscam operation, insofar as it involved Kelly, simply did not reach intolerable levels. Accordingly,

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cord Baucom v. *Martin*, 677 F.2d 1346, 1350-51 (11th Cir.1982); *United States* v. *Jannotti*, *supra*, 673 F.2d at 609. *See Hampton* v. *United States*, *supra*, 425 U.S. at 495 n. 7, 96 S.Ct. at 1653 n. 7 (Powell, J., concurring); *United States* v. *Russell*, *supra*, 411 U.S. at 432, 93 S.Ct. at 1643.

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having carefully considered all of Kelly's claims that the government's conduct violated due process, we reverse the district court's dismissal of the indictment, as well as its entry of the judgment of acquittal, and direct the district court to reinstate the indictment and the verdict of the jury.

Judgment accordingly.

GINSBURG, Circuit Judge:

"Abscam," as the District Court's thoughtful opinion details, was an extraordinary operation. The investigation was steered in large part by a convicted swindler; it relied upon con men to identify and attract targets, to whom legitimate as well as illegitimate inducements were offered; it proceeded without close supervision by responsible officials.[1] The District Court allowed the jury to determine whether defendant Kelly was "predisposed" to commit the crime charged, and therefore not

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[1] *See United States* v. *Kelly*, 539, F.Supp. 363, 366-67, 367 n. 16 and accompanying text, 374 n. 48 and accompanying text (D.D.C.1982).

We do not share Judge MacKinnon's view that, apart from "trappings of wealth," Abscam "was *not* significantly different from" run-of-the-mine "passive" undercover operations. *See* Judge MacKinnon's opinion, *supra* at p. 1469-1470 & note 51. As the District Court's opinion sets out in painstaking detail, the Abscam actors did a good deal more than simply "spread the word." Nor can we agree with Judge MacKinnon that the FBI "had ample suspicion of corruption to justify pursuing . . . Kelly." *Id.* at p. 1471. That suspicion, as Judge MacKinnon recites, was based on Ciuzio's report to Amoroso and Weinberg that "Kelly was, in fact, corrupt." *Id.* at p. 1471. But as the District Court observed:

> Ciuzio went to great lengths to make it appear that he had virtual control over the Congressman, indicating at the time that Kelly was dishonest and was already taking money and had various other weaknesses. He indicated that he had known and cultivated Kelly for about 2½ years. None of this was true. No attempt was made to verify it; and there is no indication that Weinberg and Amoroso believed it.

539 F.Supp. at 367 (footnotes omitted).

"entrapped" under the current definition of that defense.[2] After the jury returned a guilty verdict, however, the District Court dismissed the indictment against Kelly on the ground that the government's conduct of the investigation was fundamentally unfair, and therefore incompatible with due process.[3] The sole issue properly before us for review is the correctness of the due process ruling.[4]

The District Court stated and attempted to apply an objective test to determine when government investigation exceeds tolerable limits: Was the crime-inducing conduct in which the government engaged, the temptation presented to the target, modeled on reality?[5] This test, the District Court indicated,

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[2] In contrast to an "objective" test that measures the methods used to induce the criminal act against standards of acceptable police behavior, the current, "subjective" test of entrapment looks to the propensity or "predisposition" of the induced defendant to engage in the proscribed conduct. *See United States* v. *Jannotti*, 673 F.2d 578, 598-98 (3d Cir.) (en banc) (summarizing Supreme Court precendent), *cert. denied*, ___ U.S. ___, 102 S.Ct. 2906, 73 L.Ed.2d 1315 (1982); *United States* v. *Myers*, 692 F.2d 823, 835-36 (2d Cir.1982).

[3] In so ruling, the District Judge did not purport to determine whether the government produced sufficient evidence to warrant a jury finding that Kelly was "predisposed" to receive a bribe. Rather, his analysis centered on the nature of the government's overtures. 539 F.Supp. at 376-77. *Cf. United States* v. *Jannotti*, *supra*, 673 F.2d at 607-08 (lower courts must resist permitting objective test of entrapment, rejected by the Supreme Court, to reemerge as a due process defense; entrapment defense reflects Court's view of legislative intent and Congress may reshape the defense as it sees fit).

[4] As the District Judge recognized, "there is a tendency for the due process defense to overlap with the entrapment defense." 539 F.Supp. at 376 (footnote omitted). However, on this appeal pursued by the government, only the due process defense is properly presented.

[5] As the District Court phrased it: "The litmus test—or temptation—should be one which the individual is likely to encounter in the ordinary course." 539 F.Supp. at 374 (footnote ommitted).

should apply when the government had no knowledge of prior wrongdoing by the target and no reason to believe the target was about to commit a crime;[6] it would serve as a check against government creation (rather than apprehension) of criminals by offers or importuning that would never occur in the real world.[7]

The real-world test, as applied by the District Court, is speculative. The District Judge assumed that a person who offers a bribe would retreat upon encountering an initial rejection and would not "have the audacity" to press on "for fear of being reported."[8] But the first overture renders the party offering the bribe vulnerable to prosecution. "In for a calf," such a person might press on if he perceives any chance of ultimate success.[9] Nonetheless, were the slate clean, we might

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[6] *See id.* at 371 (Abscam was launched without "even the remotest suspicion about the existence [in general or with respect to any particular individual] of any prior, on-going, or imminent criminal activity"); *id.* at 373 (Department of Justice and FBI had "not even a scent of suspicion of criminal conduct, past, present, or imminent . . . by Kelly").

[7] The District Court noted that, immediately after Abscam became public, the Assistant Attorney General, Criminal Division, testified in congressional hearings that modeling the transaction after reality serves as a "guarantee of fairness" to the individual "because it means that anybody who is brought in, is brought in with the same type of temptation[] that we know is floating out there." *Id.* at 374 n. 47, citing *FBI Oversight: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 154 (1980).

[8] 539 F.Supp. at 374, 376, 377. As the District Judge finally phrased his application of the real-world test: "If after an illegal offer is made, the subject rejects it in any fashion, the government cannot press on." *Id.* at 377.

[9] As the government points out, Brief for Appellant at 68, parties to real-world transactions could readily adjust to a one-refusal rule: the bribe taker would always resist the first overture.

be attracted to an approach similar to the District Court's, and would perhaps ask whether, in real-world circumstances, the person snared would ever encounter bait as alluring as the offer the government tendered.[10]

However, our slate contains references that lower courts are not positioned to erase, We may not alter the contours of the entrapment defense under a due process cloak,[11] and we lack authority, where no *specific* constitutional right of the defendant has been violated, to dismiss indictments as an exercise of supervisory power over the conduct of federal law enforcement agents. *See United States* v. *Payner*, 447 U.S. 727, 737 n.

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[10] The inquiry might extend to the nature of the reward and quid pro quo authorized by responsible officials of the Department of Justice and the FBI, the efforts made to assure that those who carried out the scam adhered to the approved script, and the nature of the transaction in fact proposed to the target. The tolerable limit would be crossed if the opportunity offered differed qualitatively from, and therefore was more difficult to resist than, those the target would otherwise encounter. *See* Spera, *Protecting the "Otherwise Innocent": An Alternate Standard for Entrapment* (Draft, 1982).

Exchanges such as this one between an FBI agent and Ciuzio, the unwitting middle-man who conveyed the FBI's offer to Kelly, would invite particular scrutiny:

[Ciuzio] Now, you you're saying ya gonna give em twenty-five thousand

[FBI Agent] Right

[Ciuzio] For doin nothin

[FBI Agent] For doin nothin

[Ciuzio] To stand by

[FBI Agent] To stand by. And if [illegible]comes, when the guy comes . . .

Transcript of 12:13 p.m. meeting, Dec. 19, 1979, at 29.

[11] *See United States* v. *Twigg*, 588 F.2d 373, 382 (3d Cir.1978) (Adams, J., dissenting).

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9, 100 S.Ct. 2439, 2447 n. 9, 65 L.Ed.2d 468 (1980).[12] Precedent dictates that we refrain from applying the general due process constraint to bar a conviction except in the rare instance of "[p]olice overinvolvement in crime" that reaches "a demonstrable level of outrageousness." *Hampton* v. *United States*, 425 U.S. 484, 495 & n. 7, 96 S.Ct. 1646, 1653 & n. 7, 48 L.Ed.2d 113 (1976) (Powell, J., concurring) (cases, "if any," in which a "predisposed" defendant can successfully invoke a due process defense "will be rare"); *United States* v. *Russell*, 411 U.S. 423, 431-32, 93 S.Ct. 1637, 1642-1643, 36 L.Ed.2d 366 (1973).

The requisite level of outrgeousness, the Supreme Court has indicated, is not established merely upon a showing of obnoxious behavior or even flagrant misconduct on the part of the police; the broad "fundamental fairness" guarnatee, it appears from High Court decisions, is not transgressed absent "coercion, violence or brutality to the person." *See Irvine* v. *California*, 347 U.S. 128, 132-33, 74 S.Ct. 381, 382-383, 98 L.Ed. 561 (1954) (distinguishing *Rochin* v. *California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952)). Without further Supreme Court elaboration, we have no guide to a more dynamic definition of the outrageousness concept, and no warrant, as lower court judges, to devise such a definition in advance of any signal to do so from higher authority.[13]

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[12] *See also United States* v. *Caceres*, 440 U.S. 741, 99 S.Ct. 1465, 59 L.Ed.2d 733 (1979) (noncompliance with internal departmental guidelines is insufficient cause for excluding evidence).

[13] Lower courts have generally read Supreme Court precedent to confine the broad due process check on the conduct of law enforcement officers to the slim category of cases in which the police have been brutal, employing against the defendant physicial or psychological coercion that "shocks the conscience." *See, e.g., United States* v. *Alexandro*, 675 F.2d 34, 40 (2d Cir.), *cert. denied*, ___ U.S. ___, 103 S.Ct. 78, 74 L.Ed.2d 75 (1982) (attempted bribery of immigration official) ("The distinction between the ["shocking"] cases and the instant one is clear. There, the challenged conduct ranged from an invasion into the integrity of the body to an extraordinarily coercive interrogation. The activities called into question here, however,

The importuning of Congressman Kelly and the offers made to him, extraordinary and in excess of real-world opportunities as they appear to have been, did not involve the infliction of

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merely involve special investigative techniques for obtaining evidence of Alexandro's voluntary participation and do not entail bodily invasion."); *Yanex* v. *Romero*, 619 F.2d 851, 855 (10th Cir.), *cert. denied*, 449 U.S. 876, 101 S.Ct. 221, 66 L.Ed.2d 98 (1980) (threat to use a catheter to take urine sample from recalitrant prisoner not shocking) ("It was very likely the lack of force and brutality was instrumental in the Court's ruling [in *Schmerber* v. *California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966)]."); *United States* v. *Ford*, 553 F.2d 146, 155 n. 34 (D.C.Cir.1977) ("The *Irvine* case did not fall within the exclusionary rule of *Rochin* . . . because there had been no coercion, violence, or brutality to the person.") (dictum); *United States* v. *VanMaanen*, 547 F.2d 50 (8th Cir. 1976) (not shocking that police prepared false reports, advised witness to leave town, failed to disclose before trail existence of informant); *United States* v. *Gengler*, 510 F.2d 62 (2d Cir.) (kidnapping of defendant from Bolivia and transportation to the United States not shocking), *cert. denied*, 421 U.S. 1001, 95 S.Ct. 2400, 44 L.Ed.2d 668 (1975); *United States* v. *Harrison*, 432 F.2d 1328 (D.C.Cir. 1970) (grabbing throat to prevent swallowing of heroin capsules not shocking because calculated to prevent destruction of evidence); *Rivas* v. *United States*, 368 F.2d 703, 710-11 (9th Cir. 1966) (body cavity border search) ("This is *not* a *Rochin* case, with its physical assault on a defendant, both before the stomach pumping, and at the time of its occurrence. It was the *physical assault* in *Rochin* which caused reversal. . . ."), *cert denied*, 386 U.S. 945, 87 S.Ct. 980, 17 L.Ed.2d 875 (1967); *Blefare* v. *United States*, 362 F.2d 870 (9th Cir. 1966) (in connection with border search, rectal examination, administering an emetic, stomach pumping, largely without objection by defendant, not shocking); *United States* v. *Baskes*, 442 F.Supp. 322, 333 (N.D.Ill.1977) ("In *Irvine* itself, the Supreme Court apparently limited application of the supervisory powers doctrine to cases which involved 'coercion, violence or brutality to the person.' ") (dictum), *aff'd*, 649 F.2d 471 (7th Cir. 1980).

Contrast Hall v. *Tawney*, 621 F.2d 607, 613 (4th Cir. 1980) (corporal punishment of students might violate due process if it "amounted to a brutal and inhumane abuse of official power, literally shocking to

pain or physical or psychological coercion. We are therefore constrained to reverse, although we share the District Court's grave concern that the Abscam drama, both in its general tenor, and in "the [particular] manner in which Kelly was handled," 539 F.Supp. at 373, unfolded as "an unwholesome spectacle."

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the conscience"); *Huguez* v. *United States*, 406 F.2d 366, 379 (9th Cir. 1969) (warrantless border search of rectal cavity without clear prior indication it contained narcotics shocking (dictum)

But see United States v. *Valencia*, 541 F.2d 618, 621-22 (6th Cir. 1976) (violation of attorney-client privilege of codefendant may be grounds for dismissing charges).

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Cr. No. 80-00340

UNITED STATES OF AMERICA

Plaintiff,

v.

RICHARD KELLY, EUGENE ROBERT CIUZIO, a/k/a/ GINO CIUZIO, and STANLEY WEISZ,

Defendants.

FILED
MAY 13 1982
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

ORDER

For the reasons stated in the accompanying memorandum, it is hereby

ORDERED that defendant Kelly's motion for judgment of acquittal and to dismiss the indictment against him is granted, and it is

FURTHER ORDERED that judgment of acquittal is granted and the indictment against defendant Kelly is dismissed, and it is

FURTHER ORDERED that the judgments against defendants Ciuzio and Weisz are vacated and a new trial is granted as to them, and it is

FURTHER ORDERED that the motion to reopen is denied.

William B. Bryant
UNITED STATES DISTRICT JUDGE

Date: May 13, 1988

APPENDIX H

United States District Court,
District of Columbia.

No. Cr. 80-00340.

UNITED STATES of America, *Plaintiff*,

v.

Richard KELLY, Eugene Robert Ciuzio,
a/k/a/ Gino Ciuzio, and Stanley Weisz, *Defendants*.

May 13, 1982

MEMORANDUM ON DUE PROCESS AND OTHER POST TRIAL MOTIONS

BRYANT, Senior District Judge.

Former Congressman Richard Kelly was found guilty of bribery, 18 U.S.C. § 201(c), conspiracy, 18 U.S.C. § 371, and violation of the Travel Act, 18 U.S.C. § 1952. Eugene Ciuzio and Stanley Weisz were found guilty of conspiracy, aiding and abetting, 18 U.S.C. § 2, and violating the Travel Act. All three defendants have *made motions to dismiss their indictments* because the government violated due process, *for judgments of acquittal*, and *for a new trial*. Ciuzio has also moved for a severance and a new trial. *For the reasons that follow, the court is dismissing the indictment against Kelly and granting new trials to Ciuzio and Weisz.*[1]

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[1] The government has submitted, in its brief of October 30, 1981 at n.2, that the relevant evidence for the due process issues includes the entire record in this case as well as in the other Abscam cases. The defendants have cited evidence from other cases in their briefs. The court agrees that any evidence of government conduct which affected the defendants in this case is relevant, and has therefore considered that evidence as reflected in the transcripts and exhibits from the other due process deliberations.

I.

"Abscam" is a code word used by the Federal Bureau of Investigation (FBI) to identify an undercover operation which was originally intended to uncover securities fraud and recover stolen art treasures, and ended up with FBI agents and a master criminal posing as representatives of Arab sheiks attempting to persuade Congressmen to take bribes in front of hidden video cameras. The Second Circuit characterized this latter phrase as a plan of the Executive Branch of the government of the United States "to determine whether members of the Legislative Branch and others would commit bribery offenses if presented with the opportunity to do so."[2] In another Second Circuit case, Judge Kaufman observed that "Abscam indeed was an intricate artifice, a stratagem of contrived ploys and schemes designed to test the faith of those in high echelons of government who are the repositories of the public trust."[3] In yet another related case, the Third Circuit pointed out that "the basic plan evolved into [the] various subparts, each with its own cast of participants which were ultimately the subject of [prosecution]," and emphasized that it was focusing on the particular facts material to the case which it had under consideration.[4] Abscam has also been referred to by the government from time to time as a "sting operation." I suppose, in a general sense, all these descriptions apply. However, in order to make the reasons for the disposition of this case very clear, a little more detailed treatment of this final phase of Abscam and the precise manner in which it related to Kelly is necessary.

In 1977, FBI agents prevailed upon a federal judge to allow a swindler and con man to remain free on probation after conviction for mail fraud in exchange for a promise to cooperate with the Bureau in some of its endeavors against organized crime.[5]

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[2] *United States* v. *Myers*, 635 F.2d 932, 934 (2d Cir. 1980).

[3] *United States* v. *Alexandro*, 675 F.2d 34 at 43 (2d Cir. 1982).

[4] *United States* v. *Jannotti*, 673 F.2d 578 at 581 (3rd Cir. 1981).

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This convict, Melvin Weinberg, stated flatly this his motivation to work for the FBI was "that I could make some big money."[6] Shortly after the FBI intervention, Weinberg was hired on a monthly basis to be a principal participant in the earlier phase of Abscam, i.e., the securities and art aspects. In January 1979, shortly after Agent Amoroso took over as Weinberg's immediate supervisor, Amoroso recommended that Weinberg's pay be raised from $1,000 per month plus expenses to $3,000 per month plus expenses because, among other reasons, Amoroso was concerned that Weinberg would "try and con other people on the side" if his living habits were not kept up.[7] This regular income was supplemented by substantial bonuses from time to time. Meanwhile, the field agents and Weinberg were maintained on a living standard consistent with great wealth.[8] Not long thereafter some white collar crime was uncovered in the Immigration and Naturalization Service.[9]

The record reflects that the last of the various "subparts" or "convoluted ploys," which ultimately resulted in the indictment of several Congressmen, was conceived—lock, stock, and barrel—by Weinberg and made its first appearance on July 14, 1979 in a conversation with George Katz, a defendant

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[5] Tr. at 1553-60. "Tr." refers to the trial transcript in this case. References to transcripts or exhibits of other proceedings are preceded by the name of the case from which the transcript or exhibit comes. *See* note 1.

[6] Tr. at 1557.

[7] Tr. at 1027-30.

[8] Tr. at 1358. *See also, United Staes* v. *Jannotti*, 501 F.Supp. 1182, 1193-94 (E.D.Pa. 1980).

[9] *Alexandro.*

in another case.[10] Up until the time that the tape of this conversation was reviewed sometime within the following two weeks, apparently nobody in the FBI had entertained the notion of testing the virtue of legislators with the investment/immigration problem scenario.

This scenario was indeed "an intricate artifice." As Weinberg told Katz, the Arab sheiks, who had been investing in the

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[10] *Myers* due process exhibit 58 at 11-24, is a transcript of a conversation on July 14, 1979 between Weinberg and Katz.

The evolution of the public explanations for the origin of the asylum scenario itself raises interesting questions which need not be answered here.

Weinberg first testified about the origin of the asylum scenario in the *Jannotti* due process hearings before Judge Fullam in Philadelphia. There, he said that the idea first occurred to him while on a yacht on July 26 as a result of a suggestion by Criden. *Jannotti* due process at 3.86-3.87. Amoroso testified at the same hearing that *he* thought of the scenario the day before they were on the yacht as a result of a July 25 newspaper article about former Nicaraguan dictatator Somoza's immigration problems. *Id.* at 5.148-49. In the Brooklyn due process hearings, Amoroso repeated the newspaper article story. *Myers* due process at 4107. However, he later admitted that his review, prior to the July 26th meeting, of the Weinberg-Katz tape, where the entire scenario was discussed, might have had "some bearing in [his] mind" when he suggested the asylum scenario on July 26. *Id.* at 4109.

The government's assertion in oral argument, *Kelly* due process at 180-83, that the genesis was prompted by an ad lib by Amoroso on July 26 and that the idea was merely passed along by Weinberg and Amoroso after being "originated by Errichetti, Criden and Congressman Myers," *id.* at 182, is not in accordance with the record. And neither is the government's latest representation to the effect that "Abscam was not the creation of Weinberg" if the term Abscam is meant to refer to the asylum scenario. There is no evidence of the originator of the initial Abscam concept—the securities and art recovery project—but the record is absolutely clear that the final phase which was directed at Members of Congress was Weinberg's brainchild.

United States, were afraid that there would come a time when they would have to flee their country because of internal problems, as did the Shah of Iran. To insure against any problems they may have with immigrating to the United States, Weinberg said the sheiks wanted to "sign up" as many Congressmen and other public officials as possible.[11] The Congressmen's commitment would be secured with promises of investment in their districts and payments of cash to them.

Apparently the FBI quickly approved the new phase of the operation, and Weinberg used his connections with other con men and criminals to spread the word that $25,000 would be paid to Congressmen and $50,000 would be paid to U.S. Senators for their help.[12] More money would be paid when the sheiks actually got into this country.[13] This money was in addition to the millions of dollars of legitimate investments which would be directed to the districts of helpful Congressmen.

The anticipated effect of this offer was that persons would be encouraged to bring the offer of investments and cash to the attention of Congressmen in the hope of getting a piece of the action. Weinberg characterized his announcement as "setting out a honey pot" and then just sitting back and waiting. As was to be expected, Weinberg's proposition activated some hustlers and con men with varying degrees of expertise who were anxious to cash in. Inasmuch as the contacts between the middlemen and the Congressmen were not monitored, the Bureau had no first-hand knowledge of whether both the legal and illegal aspects of the deal were presented to the Congressmen, and what the responses were.

The scheme affected Kelly in the following fashion. William Rosenberg, goaded on by Weinberg and Amoroso with promises of millions of dollars for various chores undertaken on

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[11] *Myers* due process exhibit 58 at 11-24.

[12] Tr. at 1090-91.

[13] *Id.*

behalf of the enterprise,[14] passed the word to, among others, Stanley Weisz. Sometime later, Weisz mentioned the general proposition to Gino Ciuzio who had become acquainted with Congressmen Kelly in the fall of 1979.

After a series of phone calls, Rosenberg and Weisz put Ciuzio in contact with Weinberg and a meeting was arranged for Ciuzio, Weinberg, and Agent Amoroso (who used the alias Tony DeVito). At this meeting, on December 19, 1979, Ciuzio went to great lengths to make it appear that he had virtual control over the Congressman, indicating at the time that Kelly was dishonest and was already taking money and had various other weaknesses. He indicated that he had known and cultivated Kelly for about 2½ years.[15] None of this was true. No attempt was made to verify it;[16] and there was no indication that Weinberg and Amoroso believed it.

This meeting amounted to a briefing for Ciuzio, who wanted to know the details of Weinberg's proposition. Ciuzio was filled in by Amoroso and Weinberg and instructed as to how to make his pitch to Kelly. Indeed, at one point during this briefing, Ciuzio said: "Whatever program you feed into me, I'll give it to him."[17] The program, of course, included the very attractive investment in the Congressman's district on the one hand, along with the proposal to buy his assistance in any immigration problem. Also during this briefing, Ciuzio sought to convince Weinberg and Amoroso that if they would just give him

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[14] Tr. at 1073. Rosenberg has pled guilty in this case to conspiracy to bribe and defraud the United States.

[15] Government exhibit 1(b) and (c) at 18.

[16] Tr. at 4123-24, 1115-16. FBI Director Webster has testifed that since the middlemen do not know they are dealing with the FBI and are not monitored or controlled, "[w]e must, therefore, carefully evaluate any information they provide us as to the willingness of a third party to engage in a crime before we proceed further, and assume that if such a third party does meet with us, he is aware of the criminal nature of the meeting." *Myers* due process exhibit 110 at 24.

[17] Government exhibit 1(b) and (c) at 30.

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the money they would have nothing to worry about—"I'll take a bag of money and we are through with the whole thing."[18] The money, by the way, was no longer $25,000, but had been raised by Ciuzio to $250,000, or as he put it, "a quarter mill." To this proposition Weinberg quickly said: "That's agreeable."[19] Obviously, Weinberg was authorized to dangle any amount of money before the middlemen in order to accomplish their purpose.

Ciuzio then went to Kelly and apparently fed him the program he had been given. At the trial of the case, the uncontradicted testimony of both Kelly and Ciuzio was that when Ciuzio told Kelly that money was available for him, Kelly rejected the idea of a pay-off, but at the same time expressed interest in the legitimate bait, that is, the enormous investments which were proposed for his district.[20] Thus, the only evidence presented at trial shows that when the bribe was first offered to Kelly, by Ciuzio, it was rejected.

Finally, a meeting was set up for January 8, 1980 at the FBI's townhouse in Washington at which Kelly was to meet the representatives of the Arab sheiks. Soon after arrival at the townhouse Ciuzio, in a one-on-one confrontation with Weinberg, made a frantic and what appears to be desperate argument against offering Kelly any money. Unbeknownst to Ciuzio, this encounter was videotaped. In an unrecorded meeting between Ciuzio and Amoroso in a hallway, a similar conversation occurred. During the Ciuzio-Weinberg encounter, Ciuzio immediately told Weinberg that Kelly had indicated to

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[18] *Id.* at 19. Ciuzio sought to convince Weinberg and Amoroso that he had such control over the Congressman that it was unnecessary for them to deal with Kelly and that Ciuzio himself would guarantee that what they wanted would in fact be done. Weinberg and Amoroso insisted on some contact with the Congressman and began to tell Ciuzio how to make his pitch.

[19] *Id.* at 17.

[20] Tr. at 2663-66, 2851-57, 3046-48.

him that he would not take any payoff for what he would do for the sheiks.[21] Later, the conversation went as follows:

Ciuzio: Now, here's what I'm telling ya.

He's a kid and I know he's ripe for the first big . . . score. This a Congressman, ya understand? This ain't a . . . hustler, cause we're hustlers. We're wise guys . . . shake hands . . . budabomb . . . budabomb . . . buda . . . It don't mean nothin, ya know what I'm saying? Don't hand him no . . . money, don't talk money, tell him what the problem is, how could ya help, he'll explain it . . .

Weinberg: I don't know, ya gotta speak to him. That may be a problem, Gino. Why don't you . . .

Ciuzio: Listen, let me tell ya what you're buying here, ok. You know this. Cause maybe this is his first shot in this role, all right? He ain't buying no . . . Congressman. He's buying the vehicle to accomplish your package, ya follow? He ain't s. . . let me tell ya somethin . . .

Weinberg: Sit down a second and we can talk.

Ciuzio: Now let me explain it ta ya this way. Now that we're here, see, cause I make . . . things happen. With a little miscommunication with the other two guys and you, you get nervous ya know, makin' a big deal. It's a big deal if it goes wrong.

Weinberg: Yeah, but you . . . we gotta make sure . . .

Ciuzio: You can't usurp the guy's position.

Weinberg: Ok, but you understand . . .

Ciuzio: He just left, ya understand? . . .

Weinberg: we're talking . . . all right, we're talking about if he trusts you . . .

Ciuzio: Who? The Congressman? . . .

Weinberg: . . . and if you if he trusts you, right? . . .

Ciuzio: Yeah.

Weinberg: Let Tony hand you the money in front of him. Long as we know he's getting money . . .

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[21] Government exhibit 2(b) and (c) at 1.

Ciuzio: That's ok. But don't say hey, Congressman . . . ya know what I mean? Ya can't make him a . . . hood, ya know.

Weinberg: No, but he's gotta know that he's getting paid to do it, ya know the . . .

Ciuzio: Maybe, he's got the answer . . .

Weinberg: But the guy ain't lilly white, ya know. God forbid he backs out.

Ciuzio: Listen, listen to me . . .

Weinberg: . . . if somethin goes wrong, it's our jobs . . .

Ciuzio: Listen to me, do you trust, ahh Bill?

Weinberg: Yeah.

Ciuzio: I mean he talks good about you.

Weinberg: Hey . . .

Ciuzio: All right. If you don't feel that way about him, ya know, what . . . wha . . . I know ya gotta little problem here with Tony. Because if you say suppositions . . . there the . . . guy, one time, the guy came . . . This is the Congressman, I brought . . . pictures in the newspaper to prove it to ya. This is the guy. I gave it to Bill, show it to Mel, I show it to Tony . . .

Weinberg: Well, he knows he's getting money right?

Ciuzio: He ain't taking no . . . money in his hand.

Weinberg: All right, you'll take it . . .

Ciuzio: All right . . .

Weinberg: . . . he'll hand it to you.

Ciuzio: . . . and I want to tell you another thing . . .

Weinberg: Yeah.

Ciuzio: . . . and nobody out there's getting no . . . money. I'll have no response to the money. If, if nottin happens here, if you give us the money, he don't do it, I'll give you the . . . money back.

Weinberg: Well, that ain't the idea. The problem ya know, Gino let me tell you . . .

Ciuzio: Ya know this has, like, been a one-way deal.

Weinberg: We we look, we don't mind paying the money. But we gotta problem that we go to Yassir and we say ta him, we laid it out, he said did you give it to the Congressman, we don't care the first twenty-five goes to him, the rest I told ya, I'll deliver to you.

Ciuzio: I told ya before on the phone, because it's hard on the phone, ya know what I mean? I can't tell you . . . you're gonna get killed by a . . . car tomorrow.

Weinberg: Yeah but you don't

Ciuzio: We understand that

berg: . . . we're not, Tony'll tell him that we're not a g for a guarantee.

Ciuzio: I don't wanna have to give the guy a . . . bribe. That's what I'm telling ya.

Weinberg: Well . . .

Ciuzio: It ain't necessary, ya know what I mean?

[Tony DeVito (in another room): How bout some ahh, do we have any club soda?]

Weinberg: But the idea . . .

Cuizio: I don't like to talk ta him like that. I talk ta him in a different way.

Weinberg: It's not that, hey . . . we believe . . .

Ciuzio: Here's the kind of guy that says listen now, hey if it helps you, God bless you. I don't want nothing, I owe you one, and he goes, listen if you could find a buyer for my real estate . . .

Weinberg: But this is a different . . . but this is a different story Bill told us, now wait a second, let me tell ya . . .

Ciuzio: I don't know what Bill told ya.

Weinberg: I'm talking . . . and Weisz.

Ciuzio: We went through this once before you and I . . .

Weinberg: Weisz said to me, the way we laid it out, the guy was coming here and we were to tell him that it's a hundred thousand for him . . .

Ciuzio: No sir, no . . . way you gonna tell him that . . .[22]

. . . .

Weinberg: No no, I laid the whole thing out with him . . .

Ciuzio: . . . Because he was putting stipulations . . .

Weinberg: I laid . . .

Ciuzio: about the money . . .

Weinberg: Well maybe he has stipulations . . .

Ciuzio: . . . the escrow, front money now, and . . . this and that guarantee.

Weinberg: No no, he no no. The problem was, here's the deal I made with him. Twenty-five now to him and he says it goes one on one in the room. I says good enough, one on one. I will not be there, it'll be just Tony . . .

Ciuzio: I'll tell you what his answer will be . . .

Weinberg: Wait, wait let me finish . . .

Ciuzio: . . . he's gonna have ta talk to him.

Weinberg: Wait, second thing was that the balance of the money, when we call up within a week or two, ta go, I would deliver him the balance when I say go, anywhere he wants in a suitcase, all right, the other two hundred and twenty-five thousand, and that's it and then we don't even . . . want to see you . . .

Ciuzio: Who you gonna deliver it to?

Weinberg: It's to Weisz.

Ciuzio: Ohh, that's all right with me, I don't give a . . .

Weinberg: All right? And there was no, I don't ever want to see the Congressman no more. All we want to know is the guy is working for us, he's gonna do our bidding and that's all we want to know.

Ciuzio: went through all this. . . . If he's here, I've told him the whole . . . thing. Know what his answer was to me?

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[22] *Id.* at 2-6.

Weinberg: . . . what?

Ciuzio: Naah, I owe ya one. But you know I've got two pieces of property in ahh . . . St. Petersburg. Yeah it's sold. That's the way he talks.

Weinberg: See we can . . . we can't, we look . . . let me explain. We can't pay a quarter of a million dollars and the guy is gonna say he owes ya one . . .

Ciuzio: Let me tell ya somethin, I'm gonna tell . . . I'm gonna punch a hole right in your logic . . . You're gonna make a . . . hoodlum outta him for twenty-five thousand. You're gonna try . . .[23]

Although we do not have a recording of the conversation, the testimony shows that during the Ciuzio-Amoroso meeting, Ciuzio also tried to impress Amoroso with the fact that no money should be offered to the Congressman.[24]

Finally, the Congressman met with Amoroso alone. Soon after sitting down in the privacy of a separate room, Amoroso proposed a payment of money to Kelly. The Congressman told him that he was interested in the investment in his district but that whatever arrangements Amoroso had about paying money for his help with immigration, he had "no part in that."[25] Amoroso was not deterred. He intimated that the large investments could very well be made somewhere else in the country and brought up the illegal payments again. Again the Congressman told him that he was there to talk to him about the investments in his district and tried to keep the conversation on that subject. At the trial, Amoroso explained his tenacity: "Well, because I wasn't clear in my mind as to what the Congressman was really thinking about or what he was sure of. Until I could clear it up in my own mind, I did not want to give him any money."[26] When it appeared that Amoroso was not

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[23] *Id.* at 8-9.

[24] Tr. at 1139-40, 1171-72, 1175.

[25] Government exhibit 2(b) and (c) at 16-17.

[26] Tr. at 1178.

making headway on the bribery offer to the Congressman, a government attorney, John Jacobs, who was stationed in a basement room set up to monitor the happenings upstairs called up from downstairs to Amoroso.[27] Although the house was wired and set up with cameras and recording equipment, no record of the conversation was made. What transpired on that telephone and the purpose of the call were the subject of the most vague recollection, but it was ultimately conceded by both parties that Jacobs told Amoroso that Kelly was "being cute."[28] Amoroso stated that he received no instructions from Jacobs, although Jacobs was monitoring meeting for the pose of giving advice. At any rate, after the telephone call Amoroso persisted with Kelly and not too long thereafter, when $25,000 was displayed to him spread out in packets of $100 bills, Kelly accepted it as the initial payment of a $100,000 bribe.[29]

II.

Up to now, courts have been unambiguous in recognizing the function of law enforcement as preventing and detecting crime and apprehending criminals.[30] There is also general acceptance of the proposition that in order to fulfill these traditional functions, it might become necessary to resort to those techniques which frequently give rise to the claim of entrapment, i.e., artifice, deceit, and stratagem.[31] I fully appreciate the need for and the value of aggressive, resourceful, and innovative law enforcement in our modern society which far too often is beset

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[27] Government exhibit 2(b) and (c) at 18; Tr. at 1178-80.

[28] Tr. at 1181, 1392.

[29] Government exhibit 2(b) and (c) at 28.

[30] *United States* v. *Russell*, 411 U.S. 423, 434, 93 S.Ct. 1637, 1644, 36 L.Ed.2d 366 (1973); *Sherman* v. *United States*, 356 U.S. 369, 372, 78 S.Ct. 819, 820, 2 L.Ed.2d 848 (1958); *Sorrells* v. *United States*, 287 U.S. 435, 441-42, 53 S.Ct. 210, 212, 77 L.Ed. 413 (1932).

[31] *Russell*, 411 U.S. at 434, 93 S.Ct. at 1644; *Sherman*, 356 U.S. at 372, 78 S.Ct. at 820; *Sorrells*, 287 U.S. at 441, 53 S.Ct. at 212.

with diabolical criminal conduct so sophisticated as to be nearly impossible to detect. I agree with Judge Kaufman that, "carefully devised and supervised covert investigations often are the only means of discovering breaches of the fundamental mandate of one's office."[32]

However, as Abscam affected Kelly, it was not the type of carefully devised and supervised covert operation generally accepted by the courts. In many respects it differed sharply from traditionally accepted types of operations.

I know of no reported case where at least some inkling of corruption was not the forerunner of undercover activity in a bribery prosecution. When Weinberg first passed the word that money would be paid to a Congressman for immigration help and that large amounts of money were available for investment, no one in the government had even the remotest suspicion about the existence of any prior, on-going, or imminent criminal activity of this type either as to its existence in general or the participation of any individual.[33] In other words, there was nothing to trigger traditional law enforcement activities until the government made its overtures through those who were attracted to the honey pot and thus became middlemen.

The government, for obvious reasons, vehemently seeks to disclaim any government involvement beyond Weinberg and known Rosenberg, Weisz, and Ciuzio as its agents. But this position is patently untenable in the face of the evidence.[34] It is obvious that although Rosenberg, Weisz, and Ciuzio were unaware of it, they were programmed to one end, i.e., to bring in some Congressman, and in this case it was Kelly, for the

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[32] *Alexandro*, at 43.

[33] Tr. at 1352-56.

[34] *Sherman*, 356 U.S. at 374-75, 78 S.Ct. at 821-22; *Johnson* v. *United States*, 317 F.2d 127, 128 (D.C.Cir.1963).

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purpose of accepting a bribe. Amoroso admitted this on cross examination:

> Q: So on December 19, 1979, you were offering a bribe to Congressman Kelly?
>
> A: Through Mr. Ciuzio, yes.[35]

Thus, as it affected Kelly, Abscam, was not a traditional sting operation. It had a feature unknown to any sting operation that I know of. This consisted of a recruiting agent who was programmed to go out and use a formula supplied by the point man of the operation, which included a strong legitimate attraction. This formula containing legal and illegal bait was used to persuade the Congressman to become a sting patron.

The ordinary sting, on the other hand, is nothing more than a passive operation which serves as an attraction for those who become criminals under their own power, certainly with no help from anyone connected with the sting. This difference can be illustrated as follows. Persons who patronize a "fence" operation set up by police are thieves who have already committed crimes when they contact the sting. In another standard motif, police officers disguise themselves as elderly persons sitting in a park which has been plagued by robberies and muggings and, while under proper surveillance by cooperating officers, wait to be victimized by whoever gets the notion to rob them. In neither instance do we have officers, or persons programmed by them, canvassing the neighborhood with legitimate incentives designed to encourage apparently innocent persons to take advantage of the sting operation.

The unique nature of Abscam was not lost on some of the participants. Robert C. Stewart, the Attorney in Charge of the Newark Strike Force, wrote that there is a fundamental difference between the subject matter of a conventional "sting" operation and that of the present operation. In the former, the subject matter under discussion (such as a stolen television set in the hands of a junkie thief) is contraband per se and any

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[35] Tr. at 1123.

discussion about it is ipso facto incriminating. The suspect's mere presence in an ostensible "fencing" location with an item which is being offered for sale at a fraction of its face value provides more than an adequate basis for further investigative action—namely, recording the suspect's conversations about the contraband item. In the present investigation, the circumstances are fundamentally different because there is nothing inherently illegal about either the nature of the meeting place or the general topic of conversation. Indeed, absent specific facts to the contrary, there is an initial presumption of legality because of the positions which the suspects occupy and because of the ostensibly legitimate nature of the things under discussion—whether those things be the operation of a business, economic development in a particular area, or the protection of the human rights and indeed the very life of a foreign national who is touted as nothing more than a legitimate entreprenauer. Hence, the decision for further investigative action cannot be controlled by the criteria which govern such decisions in a conventional "sting" operation, but must depend instead upon the demonstrable existence of special facts which infect the particular transaction with illegality.[36]

In another memo Mr. Stewart emphasized the extent to which Abscam deviated from a conventional sting operation:

> Usually, there is little or no evidence that the offical knows anything aoout the intermediaries' representations. There may be little, if any, extrinsic information which would suggest that the particular offical is corrupt. On the contrary, most of the officials begin the conversation with disclaimers of criminal intent and offers to handle the problem in a perfectly correct and lawful manner. The Undercover Operatives then press, and they dangle large sums of money in front of the official—initially with promises that he will never be required to deliver the quid pro quo because the payment is only insurance against a remote contingency. The official relents and accepts the payment—in some cases offering to perform further criminal acts, in others without providing additional evidence

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[36] *Myers* due process exhibit 15 at 3-4.

of predisposition or criminal intent. In several cases the payment was refused.

All of this is different in kind and quality from a conventional undercover operation.[37]

Persons at the upper levels of the Department of Justice and the FBI apparently assumed that the Congressman who would show up at the townhouse, or at any other meeting place they chose, would have already agreed to take a bribe directly or indirectly, and have thus characterized the Congressman's actions as "self-selecting." However the operatives had no reason to believe that, at least so far as Kelly is concerned, since the script given to Ciuzio had both legal and illegial bait; and Kelly's appearance at the townhouse did not indicate which type of bait he was responding to.[38] As a matter of fact, the operatives in the field did not believe that Kelly came for the purpose of getting a bribe. Weinberg testified that the reason he was not going to give the money to the middlemen as conduits for the Congressman was because he believed that if he did so "[t]he would go north with it" and the Congressman would never know anything about it.[39] He also said: "I believe if we gave him [Ciuzio] the money he would have kept the money."[40]

Although the Department of Justice and the FBI disavow any purpose of testing the virtue of members of Congress,[41]

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[37] *Myers* due process exhibit 16 at 8-9.

[38] At least one public official came to the townhouse without any criminal intent. Senator Larry Pressler came to the townhouse and left when he discovered that a bribe was involved. It is difficult to understand how the government can characterize this procedure as "self-selecting" when it does not know what reason has brought a public official to its door. *See* tr. at 1389.

[39] Tr. at 3809.

[40] Tr. at 3817.

[41] FBI Director Webster said, "We are not in the business of testing morality." *Myers* due process exhibit 110 at 50.

that in fact appears to have been the sole objective of the operation. In the case of the defendant Kelly the evidence points unwaveringly to this conclusion. Given the concession that there was not even a scent of suspicion of criminal conduct, past, present, or imminent, or of criminal behavior by Kelly or any other individual, that no investiga[illegible] this regard was underway,[42] and the firm belief that if [illegible]t his hands on the money the Congressman wou[illegible] anything about it, no other objective can emerge except that of testing virtue, or as Judge Kaufman stated in *Alexandro*, "to test the faith of those in the high echelons of government."[43] Either that, or the patently unacceptable objective—prosecution for the sake of prosecution.

III.

As Judge Newman observed in *Myers*, this added dimension to the law enforcement process, "inevitably raises sensitive issues of public policy and public law."[44] If called upon to debate the wisdom and/or propriety of accepting this notion as an added function of law enforcement in our system, I would unhesitatingly urge that it not be done. I readily admit that the notion is offensive to me. Government agents, hard about the business of corrupting public officials who are free of suspicion, [illegible]y subvert our government; and on its face this pre-[illegible]wholesome spectacle. This is particularly true with respect to the manner in which Kelly was handled.[45]

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[42] *See* note 33 and accompanying text.

[43] 675 F.2d at 43.

[44] *Myers*, 635 F.2d at 934. That court expressly reserved judgment on the due process claim. *Id.* at 938 n.6.

[45] On January 7, 1981 at a bench conference during the trial of this case, I expressed strong disenchantment when I said: this case "has an odor to it that is going to be cleared away before anybody gets convicted. It has an odor to it that is absolutely repulsive. Let's get [illegible]ong with the trial. . . . But it stinks." Tr. at 2547.

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I am aware of the admonition to trial judges that they are not privileged to dismiss a case against a criminal defendant because they do not like the case or because they have some strong personal aversion to the government's conduct, and that this standing alone is not a sufficient basis for determining that such conduct is outrageous to the point of depriving a defendant of due process.[46] But, at the same time, it is inevitable that a strong visceral reaction provides the starting point or triggering mechanism which ultimately leads to the assessment that condut is so outrageous that it transcends any standard of fundamental fairness. Aware that what is repugnant to me may not be repugnant to the Constitution, I have sought to identify some discernible line between that conduct which arouses my personal resentment, and that which falls short of minimal standards of fairness.

To identify that line I need not resolve the debate over the validity of virtue testing because it is not necessary for the disposition which I make of this case. Assuming *arguendo* that this new function of law enforcement is an acceptable proposition, the application of the testing procedures in this case patently exceeds the outer limits of any concept of fundamental fairness.

The litmus test—or temptation—should be one which the individual is likely to encounter in the ordinary course.[47] To

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[46] *Hampton* v. *United States*, 425 U.S. 484, at 490, 96 S.Ct. 1646 at 1650, 48 L.Ed.2d 113 (plurality opinion of Rehnquist, J.), 494 (Powell, J. *concurring*); *Russell*, 411 U.S. at 435, 93 S.Ct. at 1644.

[47] Assistant Attorney General Philip Heymann testified before the House Judiciary Subcommittee on Civil and Constitutional Rights in hearings, immediately after Abscam became public, that it is a "guarantee of fairness" to the individual when the transaction is modeled after reality "because it means that anybody who is brought in, is brought in with the same type of temptations that we know is floating out there." *Myers* due process exhibit 110 at 34. Director Webster agreed. *Id.* at 64. No one in the FBI knew that any Congressman was illegally selling his vote. And, of course, no one knew that anyone was offering a Congressman money *after* he had agreed to something for legitimate reasons.

offer any other type of temptation does not serve the function of preventing crime by apprehending those who, when faced with actual opportunity, would become criminals. Instead, it creates a whole new type of crime that would not exist but for the government's actions.

When improper proposals are rejected in these virtue-testing ventures, the guinea pig should be left alone. In ordinary real life situations, anyone who would seek to corrupt a Congressman would certainly not continue to press in the face of a rejection for fear of being reported and arrested. The FBI of course had no such restraints in this case.

After Kelly rejected the illegal part of the offer when Ciuzio first proposed it, that should have ended the matter. However, since the government did not make this first offer through an official, nor did it monitor Ciuzio when he made the offer on behalf of the government, it did not know that Kelly had already rejected the pay-off.

If the government did not end the testing of Kelly when he rejected Ciuzio's offer because of its ignorance of Kelly's response, it should have ended the testing when Ciuzio reported to Amoroso and Weinberg on January 8th, in vehement language, that Kelly had rejected the offer and insisted that no offer be made.

Finally, after the government heard Kelly himself reject Amoroso's offer, with the words "I got no part in that," the testing should have ended. Since the government made its initial offer through Ciuzio, it had no way of knowing whether Kelly was just "being cute" or was in fact rejecting the offer. However frail one's integrity might appear, it should not be subjected to repeated assaults because of some overzealous attorney's cynical determination that the person is just "being cute." In the absence of any credible evidence that the show of integrity is some kind of ploy, or some evidence that criminal conduct has been committed by the target, he should be deemed to have passed the test.

Recognition of this minimal standard of fundamental fairness apparently prompted FBI Director Webster, according to Assistant Attorney General Philip Heymann, to direct the agents to be sure that they turn away anyone if there was any ambiguity about whether he was at the townhouse to take hundred dollar bills in exchange for a legislative act.[48] Whether this was out of deference to a defendant's rights, or out of a desire to safeguard their prosecution, the result is the same. This balance which the government itself has struck leaves me

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[48] The obvious possibility that a Congressman might be brought into the Abscam lair despite his complete lack of criminal intent was anticipated by some people in the Department of Justice and the FBI. Assistant Attorney General Philip Heymann met with FBI Director William Webster in approximately September 1979 and discussed the possibility. Heymann has testified that they were concerned

> that nobody was being led into something by mistake and we were satisfied that the situations we were creating looked unmistakenly corrupt.
>
> We I think after that meeting reiterated directives which go out to the prosecutors from me and the agents from Webster to just be sure that we—I think it was this clear and I think it's the way Judge Webster put it—"*Be sure that we turn away anybody if there's any ambiguity about it, if we are not sure that the guy is coming in to take hundred dollar bills for a legislative act, turn him away.*" [*United States* v. *Jenrette*, Cr. No. 80-289 (D.D.C., due process transcript of May 14, 1981 at 816-17) (emphasis added).]

It is obvious that Amoroso knew nothing about this precaution (*see* text accompanying note 26 *supra*). In fact he testified that his superiors gave him almost no legal or other instructions on how to conduct meetings with Congressmen. He was never instructed on the law of entrapment. *Myers* due process tr. at 3924, 4131; *Jenrette* trial tr. at 583. He did not recall discussing the elements of the crimes of bribery or conflict of interest. *Myers* due process tr. at 3937-39. Most astonishingly, he testified he received no instructions from his supervisor, John Good, and that he was operating freely and on his own, tr. at 1191; *Myers* due process at 3924-25; and that no one ever told him that if a public official said he did not want money for an official act he was to terminate the contact. Tr. at 1182. The only direction he got was the attorney's calls from downstairs urging him to press on.

comfortable with the feeling that my decision to set aside the conviction of Kelly is based on something more than just an admittedly strong personal sense of revulsion. It is all the more comforting to know that the Department of Justice and the Bureau apparently are willing to live with this dividing line and do not regard it as a handcuff on valid police authority.

It may be that the initial rejection does not mean we have an entirely saintly public servant who does not "lust in his heart," and who is not just "being cute." Moral rectitude, fear, uncertainty, or some other reason may prompt it, but a rejection, sincere or otherwise, in the ordinary course of conduct insulates the official from corruption, and this is society's great interest.

Obviously we like to think, and we hope, that our Congressmen and Senators, and indeed all public servants, are strong enough to withstand any imaginable pressure and reject any type of temptation no matter how attractive, and walk away. When they succumb to temptation we are disappointed and chagrined, as I was at the sight of Kelly stiffing $100 bills into his pockets. But in reality, the hard fact is that our public servants are not recruited from the seminaries and monastaries across the land and that they are plagued by the frailties of human nature.

Indeed, the Congress recognized this as a fact when it enacted the statutes (specifically mentioning Members of Congress) which make it a criminal offense for anyone to give, offer, or even promise anything of value to any public official in order to influence his official conduct and also for a public official to ask, receive or agree to receive anything of value in return for his official acts.[49] Thus, both parties to the transac-

[49] 18 U.S.C. § 201: Bribery of public officials and witnesses.

(a) For the purpose of this section:

"public official" means Member of Congress . . . .

(b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any

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tion are constrained. This statute obviously was not enacted in the hope that it would be violated. It has no purpose to bring out the best there is in a person, but rather to inhibit the emergence of the worst in him, and thus protect the system. The rare instances of known breaches have been met head on by firm, vigorous prosecutions which have undoubtedly served the exemplary purpose of deterrence.

Assuming *arguendo* that public officials need even more attention from law enforcement of the type we are dealing with in this case, it should be done within the context of the purposes and efficacy of the statute. Since the statute penalizes both parties to a bribe, it is highly unlikely that anyone other than a government agent immune from prosecution for violating this

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public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(1) to influence any official act; or

(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty, or

(c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

(1) being influenced in his performance of any official act; or

(2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) being induced to do or omit to do any act in violation of his official duty. . . .

Shall be fined no more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

statute would make repeated flagrant attempts at corrupting a Congressman for fear that the Congressman would notify the FBI. The penalty clause in the statute is a strong deterrent for such conduct. If no one except the FBI can make such persistent attempts, this procedure does not catch criminals, but creates them.

What the government attorney perceived as "being cute" may very well have been a brief victory of conscience over temptation which was a direct result of awareness of that penalty clause. I believe that in the circumstances of this case, any further pursuit and pressure on the part of government agents was nothing short of outrageous. A suspicion-free subject should be exempted from further testing on the basis of winning the first battle against temptation. He should not be required to win a prolonged war of attrition against chicanery. "Human nature is weak enough and sufficiently beset by temptations without government adding to them and generating crime."[50] If the government had no knowledge of Kelly doing anything wrong up to his rejection of illicit money, its continuing role as the third man in a fight between his conscience and temptation rises above the level of mere offensiveness to that of being "outrageous." No concept of fundamental fairness can accommodate what happened to Kelly in this case.

IV.

I am keenly aware that the delineation of the conduct circumscribed by the due process defense is elusive. As the Third Circuit said, there is a tendency for the due process defense to overlap with the entrapment defense.[51] However, I am satisfied that this is one of the rare cases where there is a role for the court that the jury cannot and should not play. To identify that role, I return to basic principles.

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[50] *Sherman*, 356 U.S. at 384, 78 S.Ct. at 826 (Frankfurter, J. *concurring*).

[51] *Jannotti*, at 608; *Hampton*, 425 U.S. at 494-95, 96 S.Ct. at 1652 (Powell, J. *concurring*).

The function of law enforcement is to prevent crime and catch criminals. Conversely, law enforcement exceeds its bounds when it manufactures crime and creates criminals. The manufacture of crime and creation of criminals have been specifically prohibited by numerous cases.[52]

The entrapment defense furthers this policy of preventing convictions of the "unwary innocent"[53] by inquiring first, whether the defendant was induced by the government to commit the offense, and, second, whether he was predisposed to commit it.[54] In most cases,the entrapment defense alone insures that the government does not successfully prosecute cases where it has manufactured crime or made criminals. For example, where it is not illegal to propose the commission of the criminal act, repeated urgings to commit the crime are appropriately and adequately considered within the context of the jury's inquiry as to whether those urgings constituted "inducement" and whether the defendant was predisposed to commit the crime.

In rare cases, the jury's analysis of pre-disposition is not alone dispositive of the question of the government's involvement in the manufacture of the crime. Trial courts have been cautioned that rather than by general rules, a determination of whether due process violations are fatal to successful prosecution shall be made on a case by case basis, depending on the particular circumstances in each one. In discharging this obligation in the case at bar, the starting point is an examination of the statute itself—its purpose and effect. The statutory scheme precludes even the predisposed from committing the crime under real-world circumstances after the target makes one refusal. This situation contrasts sharply with the situation

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[52] *Russell*, 411 U.S. at 434, 93 S.Ct. at 1644, *quoting Sherman*, 356 U.S. at 372, 78 S.Ct. at 820, *citing Sorrells*, 287 U.S. at 442, 53 S.Ct. at 212.

[53] *Sherman*, 356 U.S. at 372, 78 S.Ct. at 820.

[54] *United States* v. *Burkley*, 591 F.2d 903 (D.C. Cir. 1978).

in *Russell* where the Court specifically noted that the government agent did not violate any federal statute.[55] Where the government's overtures to the defendant fail substantially to model real-world behavior, the results of the government conduct, while satisfying the technical elements of the bribery statute, constitute a crime which would never otherwise occur.[56] Absent the government's conduct in this case, Kelly, even if predisposed, would have had no opportunity to act upon his predisposition in the way he did. Determination that government overtures which produce such an opportunity are not fundamentally fair because they do not comply with the real-world workings of the statute is not something which the jury has been instructed to consider and must therefore be considered by the court. Due process focuses on whether "fairness has been denied an accused in light of all the circumstances."[57]

The broader focus of the due process defense—beyond intent and predisposition to, in this case, an examination of government conduct in light of the statute allegedly violated—precludes governmental conduct which so deviates from real-world constraints that it results in a crime which would never have reached fruition but for the government's involvement. Governmental manufacture of crime in this sense is as odious, and as prejudicial to a target's rights, as is the governmental snaring of the "unwary innocent" which we term entrapment.

To reiterate, I do not believe that testing virtue is a function of law enforcement. But this personal belief aside, and assuming that it is, the method of testing must be fair. If after an illegal offer is made, the subject rejects it in any fashion, the

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[55] 411 U.S. at 430, 93 S.Ct. at 1642.

[56] The Court in *Russell* was careful to point out that the key ingredient in the drug manufacture, which was supplied by the government, was obtainable from other sources. 411 U.S. at 431, 93 S.Ct. at 1642.

[57] *Hampton*, 425 U.S. at 494 n.6, 96 S.Ct. at 1652 n.6 (Powell, J. concurring).

government cannot press on. Certainly when a person recognizes the difference between the legal and the illegal, and rejects the latter, the person should be free of further testing by a device which only government agents could have the audacity to use in the face of the penalties provided for their conduct. This standard creates a workable, discernible line separating the merely offensive and constitutionally impermissible. Crossing this line is patently outrageous. A person corrupted under circumstances which only police officials can create or by a process which only the authorities are licensed to use, has been made into a criminal by his own government.

VI.

At the outset, defendants Weisz and Ciuzio made motions to sever on the basis of Kelly's anticipated defense. During the trial, these defendants made several motions for a mistrial and severance for reasons which were not frivolous. Each time, the court sought to repair the damage with curative instructions to the jury. But upon consideration of this circumstance, the disparity in the amount of evidence as it related to Kelly on the one had and the defendants Weisz and Ciuzio on the other, and in light of the defendant Kelly's bizarre defense[58] and the

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[58] During the course of the trial, in an apparent attempt to escape conviction and at the same time hang on to some remnant of respectability, Congressman Kelly presented the bizarre, nearly farcical defense that he was conducting his own investigation of the reason why he had been surrounded by shady characters. He suggested that he was being targeted for destruction by his political enemies who resented his independence and courage in the political arena. Not a scintilla of evidence which would support this theory ever surfaced in this case.

However, as the case unfolded, I was plagued with the unsettling realization that with this loose cannon rolling around on the deck of the criminal justice system such a thing could indeed occur. Also, I became aware that even if a victim successfully invoked the defenses of selective prosecution and/or entrapment, this would be of little solace to him, for he nevertheless has been destroyed as a voice in

manner in which it was put forth, I conclude that Weisz and Ciuzio were prejudiced to the point they should be granted a new trial.

An appropriate order will be entered.[59]

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public affairs. This great potential for a type of mischief, which hopefully will always remain alien to our system, standing alone, may be a compelling justification for outlawing the government's conduct against Kelly as a law enforcement procedure. If we condone such a measure, the fall-out might well be intolerable for us all.

[59] Application has been made to reopen the due process hearing based on allegations contained in the affidavit of the late Mrs. Cynthia Marie Weinberg. The relevance of this material to the task before the court is not clear. In any event, in light of the disposition of this case and the reasons therefore, the motion will be denied.